THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 30117

PEGGY A. DETMERS,

Plaintiff/Appellant,

v.

KEVIN COSTNER

Defendant/Appellee.

Appeal from the Circuit Court
Fourth Judicial Circuit
Lawrence County, South Dakota

THE HONORABLE ERIC STRAWN
Circuit Court Judge

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JURISDICTIONAL STATEMENT

Peggy Detmers ("Detmers") appeals from the circuit court's Memorandum Decision and Order dated August 31, 2022, which granted summary judgment in favor of the Defendant, Kevin Costner ("Costner"). The Notice of Entry of Order was filed September 2, 2022. The Notice of Appeal was filed September 9, 2022. This Court has jurisdiction to hear this matter pursuant to SDCL 15-26A-3(1) as an appeal from a final judgment.

STATEMENT OF LEGAL ISSUES

I. Whether the circuit court erred in concluding Detmers's claims are barred by the doctrine of res judicata.

Yes. The facts giving rise to the current action occurred nearly a decade after the previous action and appeal had concluded. The issue raised by the current action (i.e., whether Costner could unilaterally relocate the sculptures) was not raised in the prior action or appeal and was not capable of being raised in the prior action or appeal.

Healy Ranch, Inc. v. Healy, 2022 S.D. 43, 978 N.W.2d 786.
Am. Family Ins. Grp. v. Robnik, 2010 S.D. 69, 787 N.W.2d 768.
Dakota, Minn. & E. R.R. Corp. v. Acuity, 2006 S.D. 72, 720 N.W.2d 655.
Detmers v. Costner, 2012 S.D. 35, 814 N.W.2d 146.

II. Whether the circuit court erred in interpreting "permanent" as meaning something other than permanent, and whether Costner is judicially estopped from asserting otherwise.

The circuit court determined that "permanent" meant for "a long time" as opposed to an indefinite or perpetual amount of time. The circuit court's interpretation is at odds with the plain meaning of the word "permanent," and Costner is judicially estopped from asserting that "permanent" means something other than permanent as the circuit court in the prior proceeding adopted Costner's assertion that the parties agreed to "permanently" display the sculptures at their current location and that it would be the "final" display area for the sculptures.

Hayes v. Rosenbaum Signs and Outdoor Advert. Inc., 2014 S.D. 64, 853 N.W.2d 878.

Healy Ranch P'ship v. Mines, 2022 S.D. 44, 978 N.W.2d 768.
Detmers v. Costner, 2012 S.D. 35, 814 N.W.2d 146.

III. Whether the circuit court erred when it held Costner was discharged from his agreement to permanently display the sculptures at Tatanka when he obtained Detmers's agreement to display them at that location.

Yes. The agreement to permanently display the sculptures at their current location required Costner to not only display them at that location, but to keep them at that location. The circuit court's conclusion to the contrary is at odds with the plain meaning of the word "permanent" and in derogation of Detmers's royalty and display rights as set forth in the parties' May 5, 2000 contract and as recognized by this Court in the prior appeal.

Setliff v. Akins, 2000 S.D. 124, 616 N.W.2d 878.
Nygaard v. Sioux Valley Hospitals & Health Sys., 2007 S.D. 34, 731 N.W.2d 184.
Detmers v. Costner, 2012 S.D. 35, 814 N.W.2d 146.

IV. Whether the real estate listing and statement concerning relocation of the sculptures is, as a matter of law, an anticipatory breach of the judicially determined agreement to permanently display the sculptures at Tatanka.

Yes. The real estate listing and statement that the sculptures will be relocated by Costner are unambiguous and unequivocal indications by Costner of his refusal to permanently display the sculptures at their current location.

Union Pac. R.R. v. Certain Underwriters at Lloyd's of London, 2009 S.D. 70, 771 N.W.2d 611.
Weitzel v. Sioux Valley Heart Partners, 2006 S.D. 45, 714 N.W.2d 884.
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Detmers v. Costner, 2012 S.D. 35, 814 N.W.2d 146.

STATEMENT OF THE CASE

After six years of sculpting, Peggy Detmers completed the third-largest freestanding bronze monument in the world. She was 40 years old when the five-star international Dunbar Resort was to open and she was to begin sculpting and selling reproductions of her work. She was to receive royalties for doing so and managed to secure that promise in writing after years of operating under a handshake agreement. If

the resort did not come to pass, at a minimum, she would be given back the copyright to her work.

The resort was never built. Over ten years ago, a trial court found that Costner still intended to build his resort, but that he and Detmers had agreed to permanently display the sculptures on the resort property regardless of whether the resort was ever built. This Court affirmed the trial court's finding that the parties agreed to permanently display the sculptures at that location. Detmers is now 65 years old and, like every litigant, she was forced to accept the finding in the prior action. In its most basic form, the question presented by this appeal is whether Costner also has to accept that finding?

STATEMENT OF THE FACTS & PROCEDURAL HISTORY

Facts giving rise to the first action.

In the early 1990s, Costner desired to build a five-star international resort and casino in Deadwood, South Dakota. (App. at 053; SR at 3). The resort was to be named "The Dunbar" after one of Costner's movie characters. (App. at 121–22; SR at 12–13). The resort would be located on property Costner owned north of Deadwood and include sculptures of Bison displayed at the resort's entrance. (*Id.*; *Detmers v. Costner*, 2012 S.D. 35, ¶ 2, 814 N.W.2d 146, 147).

Costner and South Dakota artist Detmers orally agreed that Detmers would create the sculptures. (App. at 053, 081, 122; SR at 3, 13, 34; *Detmers*, 2012 S.D. 35, ¶ 2, 814 N.W.2d at 147). The sculptures were to consist of 14 buffalo and three Lakota warriors mounted on horseback. (*Id.*). The sculptures were to be 25% larger than life-size, and the overall monument was to depict three Lakota warriors on horseback pursuing 14 buffalo at a "buffalo jump." (*Detmers*, 2012 S.D. 35, ¶ 2, 814 N.W.2d at 147). As part

of her compensation, Detmers was to receive royalty rights in reproductions marketed and sold at the resort. (*Id.*).

Detmers began working on the sculptures in the spring of 1994. (App. at 054, 081; SR at 4, 34). However, by the late 1990s, the resort had not been built. (App. at 053, 081, 122; SR at 4, 13, 34; *Detmers*, 2012 S.D. 35, ¶ 2, 814 N.W.2d at 147). As a result, Detmers stopped working on the sculptures. (*Id.*).

After several months of negotiations, Costner and Detmers entered into a binding contract. (*Detmers*, 2012 S.D. 35, ¶ 3, 814 N.W.2d at 147–48). The contract provided Detmers additional compensation, clarified her royalty rights on reproductions, and provided her with certain rights regarding display of the sculptures. (*Id.*). Paragraph four of the contract required the sculptures be publicly displayed at a suitable site if the resort was not under construction within three years. (App. at 028; SR at 11). Paragraph three of the contract provided as follows:

> Although I [Costner] do not anticipate this will ever arise, if the Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere, I will give you [Detmers] 50% of the profits from the sale of the one and one-quarter life scale sculptures after I have recouped all of my costs incurred in the creation of the sculptures and any such sale. The sale price will be at our above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders).

(App. at 027; SR at. 10).

Three years passed and the Dunbar still was not under construction. (App. at 123; SR at 14; *Detmers*, 2012 S.D. 35, ¶ 4, 814 N.W.2d at 148). As a result, Costner and Detmers began looking for alternative/interim locations pursuant to the public display requirement in paragraph four of the contract. (*Id.*). Detmers considered locations in Hill

City while Costner considered locations in and around Deadwood. (App. at 123; SR at 14).

Ultimately, the sculptures were placed on property Costner owned and intended for the resort. (App. at 123; SR at 14; *Detmers*, 2012 S.D. 35, ¶ 5, 814 N.W.2d at 148). As the artist, Detmers "had a place of authority" and a "heavy influence" regarding the display of the sculptures. (App. at 124; SR at 15; *Detmers*, 2012 S.D. 35, ¶ 5, 814 N.W.2d at 148 (stating Detmers was "influential" in the placement of the sculptures)). The display was called "Tatanka" and it included a visitor center, gift shop, café, interactive museum, and nature walkways. (*Detmers*, 2012 S.D. 35, ¶ 5, 814 N.W.2d at 148).

The 2008 action and appeal.

In 2008, Detmers brought an action against Costner alleging that the resort had not been built and she did not agree to the placement of the sculptures at Tatanka in the absence of the resort. (App. at 125; SR at 16; *Detmers*, 2012 S.D. 35, ¶ 5, 814 N.W.2d at 148). Specifically, Detmers claimed that the sculptures were not "agreeably displayed elsewhere" pursuant to paragraph three of the agreement because she had been promised the resort would still be built on the same property as Tatanka. (*Detmers*, 2012 S.D. 35, ¶¶ 10–11, 814 N.W.2d at 149). According to Detmers, she never thought Tatanka would be a "stand alone thing" in the absence of a resort. (App. at 128; SR at 19).

Costner, on the other hand, asserted that he and Detmers agreed to "permanently display" the sculptures on the Dunbar property and that Tatanka would be a "stand-alone, independent attraction." (App. at 133; SR at 212). According to Costner, the agreement

was that the sculptures were to remain at Tatanka "for all time." (App. at 136–37; SR at 215–16).

The trial court held that it was required to determine if Costner and Detmers had made an agreement beyond that which was necessary to create their May 5, 2000 contract. (App. at 127; SR at 18). As a result, the trial court used an implied contract analysis to determine if the sculptures had been "agreeably displayed elsewhere." (*Id.*).

The trial court found that Costner and Detmers had agreed to display the sculptures at Tatanka. (App. at 130; SR at 21). With respect to the nature of that agreement, the trial court adopted Costner's assertions and found that Tatanka would be "the final display area for the sculptures," regardless of the resort being built. (App. at 129; SR at 20). The trial court, however, found that Costner intended to build the Dunbar Resort and was in fact attempting to build it. (App. at 127–28; SR at 18–19).

This Court affirmed the trial court's findings on appeal. (*Detmers*, 2012 S.D. 35, 814 N.W.2d 146). This Court cited a telephone call between Costner and Detmers where they discussed "permanently placing the sculptures at Tatanka" and upheld the trial court's conclusion that Detmers had agreed "to permanent display of the sculptures at Tatanka." (*Id.* ¶ 10, 814 N.W.2d at 148–49). This Court held that the nature of Costner and Detmers's agreement was a factual inquiry and that the trial court did not commit clear error in finding that Costner and Detmers agreed "to permanent display of the sculptures at Tatanka." (*Id.* ¶¶ 9–10, 814 N.W.2d at 149). This Court also affirmed the trial court's determinations that Tatanka was "elsewhere" pursuant to paragraph three of the contract and that Costner was continuing to try and build the resort. (*Id.* ¶ 13, ¶ 18, 814 N.W.2d at 149–51).

Facts that occurred after the appeal.

In the ten years that followed this Court's decision in *Detmers*, Costner sold his restaurant and casino in Deadwood. (App. at 056, 082; SR at 6, 35). Costner also sold all of the property that surrounds Tatanka, which had been intended for the resort. (App. at 035, 056, 082; SR at 6, 35, 73).

In the fall of 2021, Costner listed the real estate upon which Tatanka is located for sale. (App. at 056, 082; SR at 6, 35). The listing expressly excludes the sculptures and states they "will be relocated by seller." (*Id.*).

Costner intends to relocate the sculptures and has been in discussions to relocate them to Hot Springs, Arkansas. (App. at 035; SR at 73). Costner did not inform Detmers of his intent to sell Tatanka and relocate the sculptures. (*Id.*).

The 2021 action.

In November of 2021, Detmers brought this action alleging the real estate listing and statement concerning the relocation of the sculptures constituted an anticipatory repudiation of the agreement to permanently display the sculptures at Tatanka. (App. at 053–059; SR at 3–7). Detmers alternatively requested a declaratory judgment that Costner's closing of Tatanka and relocating the sculptures would constitute a breach of the agreement to permanently display the sculptures at that location. (*Id.*).

The 2022 Memorandum Decision & Order.

The parties made cross motions for summary judgment. The trial court adopted Costner's Proposed Memorandum Decision and Order verbatim, thereby granting summary judgment in his favor. (App. at 001–012, 040–051; SR at 234–45, 247–58). The trial court held that Detmers's claims were barred by the doctrine of res judicata

because the "parties previously asked the circuit court and ultimately the South Dakota Supreme Court to interpret their respective obligations under the May 5, 2000 contract as it related to the placement of the sculptures." (App. at 005; SR at 266). With respect to the parties' agreement to "permanently" display the sculptures at Tatanka, the trial court relied upon a children's dictionary to define "permanent" as "without fundamental change for a long time." (App. at 006; SR at 267). According to the trial court, it was the children's dictionary definition of the word "permanent" that was intended by the trial court and this Court when that term was used in the prior findings and appeal. (*Id.*).

The trial court alternatively held that Costner was discharged of any obligation to display the sculptures at Tatanka after he obtained Detmers's agreement to permanently display them at that location. (App. at 008–009; SR at 269–70). As alternatives to that alternative, the trial court held that (1) the real estate listing and statement concerning the relocation of the sculptures was not an unequivocal statement by Costner that he was refusing to permanently display the sculptures at Tatanka, and (2) Detmers's 2008 Verified Complaint in the previous action constituted a breach of her duty of good faith and fair dealing, thereby discharging Costner of any obligation he had to permanently display the sculptures at Tatanka. (App. at 009–011; SR at 270–72). Finally, the trial court granted Costner summary judgment on Detmers's request for declaratory judgment on the grounds that she "has no continuing rights relating to the placement of the sculptures." (App. at 012; SR at 273).

STANDARD OF REVIEW

Summary judgment is properly granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Burgi v.*

East Winds Court, Inc., 2022 S.D. 6, ¶ 15, 969 N.W.2d 919, 923. The evidence is viewed in the light most favorable to the non-moving party and reasonable doubts are resolved in the non-moving party's favor. *Id.*

A summary judgment motion is designed to "isolate and dispose of factually unsupported claims or defenses." *Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶ 16, 817 N.W.2d 395, 401 (citing *Chem-Age Indus., Inc. v. Glover*, 2002 S.D. 122, ¶ 18, 652 N.W.2d 756, 765). Once the moving party has established its burden, the nonmoving party must "present specific facts showing that a genuine, material issue for trial exists" to prevent a grant of summary judgment. *Johnson v. Hayman & Assocs., Inc.*, 2015 S.D. 63, ¶ 11, 867 N.W.2d 698, 701 (internal citations and quotations omitted). General allegations and mere denials that do not set forth specific facts will not prevent the issuance of a judgment. *Citibank South Dakota, N.A. v. Schmidt*, 2008 S.D. 1, ¶ 8, 744 N.W.2d 829, 832.

ARGUMENT

I. Detmers's claims are not barred by the doctrine of res judicata.

"Res judicata consists of two preclusion concepts: issue preclusion and claim preclusion." *Healy Ranch, Inc. v. Healy*, 2022 S.D. 43, ¶ 40, 978 N.W.2d 786, 798; *Piper v. Young*, 2019 S.D. 65, ¶ 22, 936 N.W.2d 793, 804; *Am. Family Ins. Grp. v. Robnik*, 2010 S.D. 69, ¶ 15, 787 N.W.2d 768, 774. Issue preclusion forecloses re-litigation of a matter that has been previously litigated and decided. *Robnik*, 2010 S.D. 69, ¶ 15, 787 N.W.2d at 774. The effect of issue preclusion is referred to as "direct or collateral estoppel." *Id.* Issue preclusion, however, only bars "a point that was *actually and directly in issue* in a former action and was judicially passed upon and determined by

a domestic court of competent jurisdiction." *Id.* ¶ 18, 787 N.W.2d at 775 (emphasis added) (cleaned up); *Nemec v. Goeman*, 2012 S.D. 14, ¶ 15, 810 N.W.2d 443, 446.

Claim preclusion, on the other hand, "refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit[.]" *Piper*, 2019 S.D. 65, ¶ 22, 936 N.W.2d at 804; *Robnik*, 2010 S.D. 69, ¶ 15, 787 N.W.2d at 774. "For purposes of claim preclusion, a cause of action is comprised of the facts which give rise to, or establish, the right a party seeks to enforce." *Healy Ranch, Inc.*, 2022 S.D. 43, ¶ 45, 978 N.W.2d at 799 (cleaned up); *see also Lewton v. McCauley*, 460 N.W.2d 728, 731 (S.D. 1990) ("[I]t is the underlying facts which give rise to the cause of action that must determine the propriety or necessity of presenting a specific issue within the prior proceedings."); *Nelson v. Hawkeye Sec. Ins. Co.*, 369 N.W.2d 379, 381 (S.D. 1985); *Black Hills Jewelry Mfg. Co. v. Felco Jewel Indus. Inc.*, 336 N.W.2d 153, 157 (S.D. 1983). If the claims arise "out of a single act or dispute and one claim has been brought to a final judgment, then all other claims arising out of that same act or dispute are barred." *Farmer v. South Dakota Dept. of Revenue and Regulation*, 2010 S.D. 35, ¶ 781 N.W.2d 655, 660 (citing *Equity Res. Mgmt., Inc. v. Vinson*, 723 So.2d 634, 637–38 (Ala. 1998)); *see also Yankton Sioux Tribe v. U.S. Dept. of Health and Human Serv.*, 533 F.3d 634, 641 (8th Cir. 2008) (doctrine applies when the claims arise out of the same operative facts).

Four elements must be satisfied in order to apply res judicata: "(1) the issue in the prior adjudication must be identical to the present issue, (2) there must have been a final judgment on the merits in the previous case, (3) the parties in the two actions must be the same or in privity, and (4) there must have been a full and fair opportunity to litigate the

issues in the prior adjudication." *Dakota, Minnesota & E. R.R. Corp. v. Acuity*, 2006 S.D. 72, ¶ 17, 720 N.W.2d 655, 661; *Staab v. Cameron*, 351 N.W.2d 463, 465 (S.D. 1984). For purposes of argument, Detmers will concede that the second and third elements of res judicata have been met. As discussed below, however, the trial court's decision on this issue was error because the issue of whether Costner could unilaterally relocate the sculptures from Tatanka was never raised in the previous action and could not have been raised in that action.

The issue in the prior action was whether the sculptures were "agreeably displayed elsewhere" (i.e., Tatanka) as required by paragraph three of the contract. *Detmers*, 2012 SD 35, ¶ 10, 814 N.W.2d at 149 ("The issue at trial was whether Detmers agreed to displaying the sculptures at Tatanka, which is a factual inquiry."). The trial court found that Detmers and Costner had agreed that Tatanka would be the "final display area for the sculptures." (App. at 129; SR at 20). This Court affirmed the trial court's finding, which it characterized as Detmers agreeing to "permanent display of the sculptures at Tatanka." *Detmers*, 2012 SD 35, ¶ 10, 814 N.W.2d at 149.

Tatanka is located on the same property where Costner intended to build the resort. *Id.* ¶ 5, 814 N.W.2d at 148. Costner maintained throughout the prior action that he intended to build the resort and was attempting to build it. (App. at 127–28; SR at 18–19; *Detmers*, 2012 SD 35, ¶ 11, 814 N.W.2d at 149.

As a result, the issue of whether Costner could unilaterally move the sculptures from Tatanka to some other location was not at issue or litigated in the prior action. To the contrary, Costner successfully asserted that he and Detmers had agreed to *permanently place* the sculptures at Tatanka, even in the absence of the resort, which

Costner claimed he still intended to build on the *same property* on which Tatanka was located. Consequently, the issue preclusion component of res judicata does not estop Detmers from bringing the present action.

The claim preclusion component of res judicata also is inapplicable. There is no evidence whatsoever that Detmers or anyone else knew or should have known Costner planned to sell all of the real property intended for the resort and relocate the sculptures from Tatanka to some other site. *Healy Ranch, Inc.*, 2022 S.D. 43, ¶ 59, 978 N.W.2d at 802 ("Here, Bret was aware of each and every fact necessary to have brought his quiet title action in [the previous case.]"); *Dakota, Minnesota & E. R.R. Corp.*, 2006 SD 72, ¶ 20, 720 N.W.2d at 662 (holding claim preclusion had been met when party "knew or should have known" of the existence of facts in the prior action). Indeed, the trial court specifically found that Costner intended to build the resort at that time and was attempting to build it. (App. at 127–28; SR at 18–19). Similarly, this Court observed that "Costner maintained throughout this suit that he continues to attempt to build The Dunbar . . . ." *Detmers*, 2012 S.D. 35, ¶ 11, 814 N.W.2d at 149.

Because the prior action dealt with whether Costner and Detmers agreed to permanently display the sculptures *at* Tatanka, even in the ultimate absence of the resort, the issue of whether Costner could unilaterally relocate the sculptures *from* Tatanka was irrelevant. *Rohnik*, 2010 S.D. 69, ¶ 20, 787 N.W.2d at 775 (claim preclusion did not bar subsequent action where the issue raised would not have been relevant in the prior action). Consequently, neither party had any reason to raise that issue in the prior action. Even if they had, the trial court would have had no basis to entertain a hypothetical controversy and render an advisory opinion. *Steinmetz v. State, DOC Star Academy*,

2008 S.D. 87, ¶ 17, 756 N.W.2d 392, 399 (citing *Meinders v. Weber*, 2000 S.D. 2, ¶ 39, 604 N.W.2d 248, 263) (judicial machinery should be reserved for "problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote").

The facts giving rise to the current action occurred many years after the prior action had concluded. Costner sold all of the property surrounding Tatanka that had been intended for the resort. (App. at 035, 056, 082; SR at 6, 35, 73). In the fall of 2021, Costner listed the real estate upon which Tatanka is located for sale. (App. at 056, 082; SR at 6, 35). The listing expressly excludes the sculptures and states they "will be relocated by seller." (*Id.*). Plainly, Detmers could not have brought claims in the prior action based upon these facts because they had not yet occurred.

The trial court's decision does not specifically indicate whether Detmers's action is barred by issue preclusion or claim preclusion. (App. at 005; SR at 266). The decision appears to be based on issue preclusion as the trial court wrote that it was "evident that that the parties have litigated these issues before." (*Id.*). The trial court went on to rely upon the finding in the prior action that Costner had fully performed his obligations under the May 5, 2000 contract when he obtained Detmers's agreement to display the sculptures at Tatanka. (App. at 006; SR at 267).

The trial court's decision, however, ignores the fact that whether Costner could relocate the sculptures from Tatanka was never *at issue* and therefore was *never litigated.* And because Costner maintained throughout the prior action that the parties had agreed to permanently display the sculptures at Tatanka and that he intended to build the resort, there was no justiciable controversy over whether he could relocate the sculptures.

The only issue determined by the trial court and this Court in the prior action was whether Detmers and Costner agreed to the placement of the sculptures at Tatanka in the absence of the resort. *Detmers*, 2012 S.D. 35, ¶ 10, 814 N.W.2d at 149. That question was answered in the affirmative, and the trial court's finding, affirmed on appeal, was that the agreement was for the "permanent" display of the sculptures at Tatanka and that it was the "final display area for the sculptures." *Id.*; (App. at 129–30; SR at 62–63). Those factual findings do not preclude Detmers from subsequently asserting that Costner cannot unilaterally relocate the sculptures from Tatanka after he expressed his intent to do so. Instead, these findings serve as a foundation for her current, different claims based on new factual developments.

In summary, whether Costner could unilaterally relocate the sculptures from Tatanka was not at issue in the prior action nor was it capable of being placed at issue in the prior action. Instead, this new issue arose from Costner listing the property for sale and unequivocally stating he would relocate the sculptures, which are all acts that took place nearly a decade after the prior action had concluded. Because the issue in this action is not the same as the issue in the prior action, the trial court's decision was error and should be reversed.

II. The trial court erred in interpreting "permanent" as meaning something other than permanent, and Costner is judicially estopped from asserting otherwise.

A. "Permanent" means permanent.

In the previous appeal, this Court's opinion stated, "[t]he circuit court concluded Detmers agreed, as demonstrated by her conduct and actions, to *permanent* display of the sculptures at Tatanka." *Detmers*, 2012 S.D. 35, ¶ 10, 814 N.W.2d at 149 (emphasis

added). The opinion references a phone call between Detmers and Costner where "they discussed *permanently* placing the sculptures at a site on Costner's property where he intended to build The Dunbar." *Id.* ¶ 5, 814 N.W.2d at 148 (emphasis added). This Court used the term "permanent" while reviewing findings from the trial court that characterized Costner and Detmers's agreement to display the sculptures at Tatanka for "the long term" and that Tatanka "would be the *final* display area for the sculptures." (App. at 129–30; SR at 62–63) (emphasis added).

"Permanent" is defined by the Oxford English Dictionary as "continuing or designed to continue indefinitely without change." *Permanent*, The Compact Oxford English Dictionary 574 (2d ed. 1991). Other dictionaries define "permanent" in a similar manner. *See, e.g., Permanent*, The Oxford Dictionary of English Etymology 670 (1983) ("Lasting indefinitely"); *Permanent*, The American Heritage Dictionary 924 (2d ed. 1982) ("Fixed and changeless; lasting or meant to last indefinitely"); *Permanent*, Merriam-Webster's Collegiate Dictionary 865 (10th ed. 1995) ("Continuing or enduring without fundamental or marked change"). The trial court, however, relied, in part, upon a children's dictionary to define "permanent" as "lasting or meant to last for a long time." (App. at 006; SR at 267).[1]

The trial court's interpretation was error for several reasons. While "lasting for a long time" may be a more understandable and comforting way to describe the concept of permanence to a child, it is at odds with the plain and ordinary meaning of "permanent"

[1] The trial court cited "Merriam-Webster Kids" for its definition of "permanent." (App. at 006; SR at 267). The undersigned, however, has not been able to locate such a publication and therefore assumes the trial court relied upon Merriam Webster's Dictionary for Children: An Essential Dictionary for Students Ages 8-11 (2021).

as understood by adults and the trial court's finding in the prior action that Tatanka would be the "final display area for the sculptures." (App. at 129–30; SR at 62–63).[2]

In addition, the trial court cited terms such as "permanent alimony," "permanent disability," and "permanent employment" for the proposition that permanent "rarely, if ever, means a situation that is not subject to change." (App. at 006; SR at 267). Those terms, however, are legal terms of art created by statute or by the common law and are therefore subject to statutory and common law rules concerning modification and/or termination of those benefits. This Court did not use "permanent" in the *Detmers* opinion to refer to a legal term of art, but rather as a term of an agreement between two non-lawyers. The trial court's interpretation of the term "permanent" was error as it was contrary to its plain and ordinary meaning as understood by adults.

B. Costner is judicially estopped from taking the position that "permanent" means something other than permanent.

The gravamen of judicial estoppel is the "intentional assertion of an inconsistent position that perverts the judicial machinery." *Hayes v. Rosenbaum Signs and Outdoor Advert. Inc.*, 2014 S.D. 64, ¶ 14, 853 N.W.2d 878, 882. Generally, the following elements are considered in determining whether to apply judicial estoppel: "the later position must be clearly inconsistent with the earlier one; the earlier position was judicially accepted, creating the risk of inconsistent legal determinations; and the party taking the inconsistent position would derive an unfair advantage or impose an unfair detriment to the opponent if not estopped." *Id.* ¶ 14, 853 N.W.2d at 883. However, a

[2] "Lasting for a long time" is an extremely vague definition. The trial court did not endeavor to define "lasting for a long time," but must have believed Costner fulfilled his agreement to "permanently" display the sculptures at Tatanka under that definition, which is presumably why the trial court ruled that Costner is now entitled to unilaterally relocate the sculptures.

party's inconsistency must be as to a matter of fact, not a matter of law. *Healy Ranch P'ship v. Mines*, 2022 S.D. 44, ¶ 57, 978 N.W.2d 768, 783 (quoting *State v. Hatchett*, 2014 S.D. 13, ¶ 33, 844 N.W.2d 610, 618); *see also Gesinger v. Gesinger*, 531 N.W.2d 17, 21 (S.D. 1995).

In the prior case, the trial court used an implied contract analysis to determine if the parties had made an agreement beyond their May 5, 2000 contract. (App. at 127; SR at 60). The existence and terms of such an agreement were questions of fact. *Detmers*, 2012 S.D. 35, ¶ 10, 814 N.W.2d at 149 ("The issue at trial was whether Detmers agreed to displaying the sculptures at Tatanka, which is a factual inquiry."); *see also Wright v. Temple*, 2021 S.D. 15, ¶ 27, 956 N.W.2d 436, 446 (examining oral and implied contracts and holding that when in dispute, "the existence and terms of a contract are questions for the fact finder").

Costner maintained that he and Detmers agreed to permanently display the sculptures at Tatanka regardless of whether the resort was ever built. (App. at 137; SR at 216). In his Proposed Findings of Fact, Costner described the agreement to display the sculptures at Tatanka as "permanent" on four separate occasions. (App. at 133, 135, 137–38; SR at 212, 214, 216–17). Costner's understanding of the term "permanent" was consistent with its plain and ordinary meaning as demonstrated by two of his other proposed findings:

> 42. Costner was never certain The Dunbar Resort would exist and believed that the sculptures would be at Tatanka **"for all time."**
>
> 58. The sculptures were to be at Tatanka **"for all time."**

(App. at 136, 138; SR at 215, 217) (emphasis added) (quotations in original).

The trial court adopted Costner's position. The trial court found that the parties agreed Tatanka would be the "final display area for the sculptures" regardless if the resort were ever built. (App. at 128–30; SR at 61–63). The trial court's Memorandum Decision, expressly incorporated into its findings and conclusions, stated that "Costner built Tatanka because he knew he could provide a *permanent* and safe place to display the sculptures apart from any potential resort." (Emphasis added). According to the trial court, it was after Costner had viewed other sites that "he realized that he could create a *permanent* display area for the sculptures on a part of the property he purchased for the Dunbar." (Emphasis added). The trial court cited testimony from Costner that he believed Detmers was relieved the sculptures were being placed at Tatanka because "they were going to be *permanent*." (Emphasis added).

This Court affirmed the trial court's conclusion, which this Court characterized as "Detmers agree[ing], as demonstrated by her conduct and actions, to *permanent* display of the sculptures at Tatanka." *Detmers*, 2012 S.D. 35, ¶ 10, 814 N.W.2d at 149 (emphasis added). It did so, based in part upon Costner's testimony concerning a phone call he and Detmers had where they discussed "*permanently* placing the sculptures at a site on Costner's property where he intended to build The Dunbar." *Id.* ¶ 5, 814 N.W.2d at 148 (emphasis added). In short, the trial court accepted Costner's factual assertions that he and Detmers had agreed to permanently display the sculptures at Tatanka and, in accordance with this Court's deferential standard of review on factual findings, it affirmed the trial court's determination.

Costner's position in the current action is entirely inconsistent with the position he successfully advanced in the prior case. In his Brief in Resistance to Summary Judgment,

Costner claimed, "[a]s time progressed and circumstances changed, their [the sculptures] permanent nature changed as well, and it has become appropriate to allow their owner [Costner] to relocate them as he sees fit." (App. 096–097; SR at 162–63). In other words, the agreement to permanently and finally display the sculptures at Tatanka is now, at the discretion of Costner, transitory because he no longer intends to build the resort and seeks to relocate the sculptures.

Costner's current argument that "permanent" placement means only that the sculptures were to remain at Tatanka "for a long time" also is inconsistent with his assertions in the prior action that the sculptures were to remain there "for all times." Costner's current position is irreconcilable with the position he successfully advanced in the prior action, and allowing the successful assertion of inconsistent positions creates inconsistent results that impugn the integrity of the fact finding process. Such a result would also impose an unfair detriment to Detmers, whose agreement to display the sculptures would be found to have been permanent in one action, but temporary in a subsequent action, depending on what was expedient for Costner.

The trial court believed it was "apparent that the use of the word permanent or final in the prior proceeding was used to renounce Detmers's contention that the sculptures' placement at Tatanka was only intended to be temporary." (App. at 006; SR at 267). While that may or may not be true, Costner's position with respect to the terms of the agreement was a factual assertion that was adopted by the trial court and affirmed by this Court. There is no "renunciation" exception to judicial estoppel. To allow a party to successfully take an inconsistent position in a subsequent proceeding, by claiming he lacked candor or spoke "tongue in cheek" in a prior proceeding, would undermine the

purpose of judicial estoppel. Accordingly, Costner is estopped from asserting his agreement with Detmers was temporary, discretionary, or anything other than permanent and the trial court erred when it allowed him to successfully do so. *Hayes*, 2014 S.D. 64, ¶¶ 12–20, 853 N.W.2d at 882–84 (party was judicially estopped from deriving a new position that was contrary to what had previously been judicially adopted).[3]

III. The trial court erred when it held Costner was discharged from his agreement to permanently display the sculptures at Tatanka.

A. By obtaining Detmers's agreement to permanently display the sculptures at Tatanka, Costner was not discharged of any further obligation to display them at that location.

The trial court alternatively held that Costner's obligation to display the sculptures at Tatanka was discharged when he obtained Detmers's agreement to display them at that location. (App. 007–009; SR at 268–70). As an initial matter, discharge (i.e., accord and satisfaction) is an affirmative defense. *See* SDCL § 15-6-8(c); *see also Ivey & Kornmann v. Welk*, 2017 S.D. 42, ¶ 10, 898 N.W.2d 461, 463. "If such an affirmative defense is not pleaded, it is waived." *Varga v. Woods*, 381 N.W.2d 247, 251 (S.D. 1986) (examining whether the defendant's discharge defense was tried by implication). Costner failed to plead discharge, accord, or satisfaction as an affirmative defense. (App. at 081–084; SR 34–38). Even if that deficiency is overlooked, however, the trial court's grant of summary judgment on the issue of discharge was still error.

[3] Judicial estoppel can be raised by courts, trial or appellate, during any stage of the proceeding and upon their own motion. *Hayes*, 2014 S.D. 64, ¶ 13, 853 N.W.2d at 882. Detmers, however, independently raised the issue of judicial estoppel below upon learning Costner's allegation that the agreement did not require the sculptures be permanently displayed at Tatanka. (App. at 102; SR at 196). Detmers also set forth her position that Costner should be judicially estopped in her Proposed Memorandum and Order. (App. at 114; SR at 227). The trial court, however, did not address the issue in its decision.

The trial court confined its analysis to the May 5, 2000 contract. (App. 007–009; SR at 268–70). The problem with doing so, however, is that the May 5, 2000 contract did not cover the parties' agreement to display the sculptures at Tatanka or any of the terms of the agreement to display the sculptures at Tatanka. Instead, the May 5, 2000 contract simply required that either (1) The Dunbar be built within 10 years or (2) the sculptures be "agreeably displayed elsewhere…." (App. at 027; SR at 10). Because the May 5, 2000 contract listed future events, one had to go outside the contract to determine the occurrence or non-occurrence of those events. The trial court in the prior action recognized this concept and made the following Conclusion of Law:

> Because the issue in this case, whether the sculptures were agreeably displayed elsewhere, requires the Court to determine if the parties made an *agreement beyond which is necessary to create the May 5, 2000 contract*, the law of implied contracts is applicable. The Court must determine whether the parties' words, actions, and non-actions constituted a further agreement, i.e. an implied contract, regarding the placement of the sculptures somewhere other than The Dunbar.

(App. at 127; SR at 18) (emphasis added).[4]

The trial court in the prior action then undertook its fact finding function and concluded that Costner and Detmers had reached an agreement (i.e., formed an implied contract). *Wright*, 2021 S.D. 15, ¶ 27, 956 N.W.2d at 446 (the existence and terms of an oral or implied contract are questions for the fact finder); *J. Clancy, Inc. v. Khan Comfort, LLC*, 2021 S.D. 9, ¶ 18, 955 N.W.2d 382, 389 ("If in dispute, however, the existence and terms of a contract are questions for the fact finder."); *Setliff v. Akins*, 2000

[4] This Court also recognized that the trial court's conclusion in the prior action was reached as a result of an implied contract analysis. *Detmers*, 2012 S.D. 35, ¶ 10, 814 N.W.2d at 149 ("The circuit court concluded Detmers agreed, *as demonstrated by her conduct and actions*, to permanent display of the sculptures at Tatanka."). (Emphasis added).

S.D. 124, ¶ 27, 616 N.W.2d 878, 888 ("The existence of an implied contract, as well as its terms, are questions of fact to be determined by a jury."). The terms of that agreement were that the sculptures would be displayed at Tatanka and that Tatanka would be the final/permanent display area for the sculptures. (App. at 129–30; SR at 20–21; *Detmers*, 2012 S.D. 35, ¶ 10, 814 N.W.2d at 149.

Thus, while the trial court's initial ruling in this action attempts to re-define "permanent," its alternative ruling seeks to outright ignore that term by ignoring the prior findings related to the implied contract and its terms. "Permanent" imposes an ongoing obligation to display the sculptures at Tatanka as opposed to an obligation that was discharged the moment Costner obtained Detemers's agreement to display them at that location.

Even if the findings concerning the implied contract and its terms could be ignored, which they cannot, the May 5, 2000 contract and the facts that pre-date it do not support the trial court's holding that Costner was discharged from his obligation to display the sculptures at Tatanka. Costner and Detmers's initial oral agreement provided that part of her compensation would be in the form of royalty rights from the sale of reproductions of the sculptures. *Detmers*, 2012 S.D. 35, ¶ 2, 814 N.W.2d at 147. When the resort had not been built by the late 1990s, Detmers stopped working on the sculptures. *Id.* The impasse was resolved by the May 5, 2000 contract, which expressly provided Detmers with royalty rights and rights concerning the display of the sculptures. *Id.* ¶ 3, 814 N.W.2d at 148.

The contract required the sculptures to be put on public display if the resort was not under construction within three years. (App. at 028; SR at 11). In that event, the

location of the display was to be agreed upon by both parties, but Costner reserved the right to make the final decision if the parties did not agree. (*Id.*). In the event the resort was not built within 10 years, however, the sculptures had to be "agreeably displayed" and the contract did not provide Costner with the right to unilaterally choose the location in the event of a disagreement. (App. at 027; SR at 10).[5]

Thus, the May 5, 2000 contract required that in the absence of the resort beyond 2010, the sculptures had to be "agreeably displayed." (*Id.*). It was one of the "certain rights regarding display of the sculptures" Detmers was provided by the May 5, 2000 contract. *Detmers*, 2012 S.D. 35, ¶ 3, 814 N.W.2d at 148 (stating the May 5, 2000 contract provided Detmers with "certain rights regarding display of the sculptures"). That right is consistent with the fact that the existence of the resort was so important to Detmers that she had stopped working on the sculptures in the late 1990s when the resort had not been built. *Id.* ¶ 2, 814 N.W.2d at 147. That right is also consistent with the fact that Detmers had spent 6 years of her life creating the sculptures and that part of her compensation was to be earned from royalties resulting from the sale of reproductions of the sculptures.[6] *Id.* ¶ 3, 814 N.W.2d at 148 (contract provided Detmers royalty rights on reproductions); (App. at 054, 082; SR at 4, 35).

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[5] The trial court in the current action held that the interim display agreement in paragraph four, which gave Costner the right to make the final decision regarding the location of the sculptures if the Dunbar were not under construction within three years, "evidences the parties' intent that Costner have greater decision-making authority when placing the sculptures." (App. at 009; SR at 270). Contrary to the trial court's reasoning, paragraph four demonstrates that the parties knew how to give Costner the sole right to determine the location of the sculptures in the event of a disagreement. Paragraph three, which controls in the event the resort was not built within 10 years, gives Costner no such right, but expressly requires the sculptures be "agreeably displayed." (App. at 027; SR at 10).

[6] Recall that the resort was to be a five-star international resort and casino. (App. at 053, 081; SR at 3, 34).

The trial court's holding is contrary to the May 5, 2000 contract and the events that pre-date it. Detmers's right to have the sculptures displayed at an agreeable location in the absence of the resort is no right at all if Costner was discharged of all of his obligations as soon as he obtained her agreement to do so. Under that reasoning, Costner was free to subsequently relocate the sculptures wherever he saw fit, and in fact, would be under no obligation to display them at any location, agreeable or otherwise. This would not only nullify the "agreeably displayed" language in paragraph three of the May 5, 2000 contract, but would allow Costner to significantly impair or nullify Detmers's royalty rights set forth in paragraph two of that contract.

When the factual finding in the prior action that the parties agreed to *permanently* display the sculptures at Tatanka is also considered, however, the trial court's reasoning becomes untenable. Simply put, Costner's procurement of Detmers's agreement to permanently display the sculptures at Tatanka cannot, by definition, discharge him of any further obligation to display them at that location. The agreement to permanently display the sculptures at Tatanka requires not only that the sculptures be placed there, but that they remain there. In the absence of the resort, if the sculptures are to be relocated, the May 5, 2000 contract requires they be displayed at a location agreeable to both parties.

B. Detmers's Verified Complaint in the 2008 action did not discharge Costner from his contractual duties.

"Every contract contains an implied covenant of good faith and fair dealing which prohibits either contracting party from preventing or injuring the other party's right to receive the agreed benefits of the contract." *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 841. The duty of good faith and fair dealing permits a party to bring an action for breach of contract when the other party:

> [B]y [its] lack of good faith, limited or completely prevented the aggrieved party from receiving the expected benefits of the bargain. A breach of contract claim is allowed even though the conduct failed to violate any of the express terms of the contract agreed to by the parties.

Nygaard v. Sioux Valley Hospitals & Health Sys., 2007 S.D. 34, ¶ 21, 731 N.W.2d 184, 194 (quoting *Garrett*, 459 N.W.2d at 841) (alterations in original).

The duty of good faith and fair dealing "is not a limitless duty or obligation[,]" however. *Nygaaard*, 2007 S.D. 34, ¶ 22, 731 N.W.2d at 194. It cannot be used to conflict with or modify the terms of the parties' agreement. *Id.* "[I]f the express language of a contract addresses an issue, then there is no need to construe intent or supply implied terms under the implied covenant." *Zochert v. Protective Life Ins. Co.*, 2018 S.D. 84, ¶ 22, 921 N.W.2d 479, 487 (internal quotation marks omitted).

In this case, the trial court stated, "[a] fair reading of paragraph three [of the May 5, 2000 contract] would indicate that the parties would in good faith seek an agreeable display of the sculptures if The Dunbar did not come to fruition within ten years." (App. at 010–011, SR at 271–72). The trial court then cited Detmers's initial Complaint from the 2008 action that stated she would not agree to permanently display the sculptures at any location other than the resort. (App. at 011; SR at 272). According to the trial court, this constituted an anticipatory repudiation of the May 5, 2000 contract and discharged Costner of any obligations he had under paragraph 3 of that contract. (*Id.*) The trial court's decision was error for several reasons.

First, without regard to whether it is "fair," a literal reading of paragraph 3 of the May 5, 2000 contract demonstrates that neither party was obligated to agree to a location other than the resort. (App. at 027; SR at 10) ("[I]f the Dunbar is not built within 10

years or the sculptures are not agreeably displayed elsewhere...."). That provision expressly contemplates the parties may not agree to an alternative location and provides for the sale of the sculptures in the event the parties do not agree. (*Id.*). It was error for the trial court to create an amorphous duty that modifies that provision and mandates an agreement. *Nygaard*, 2007 S.D. 34, ¶ 22, 731 N.W.2d at 194.

Second, the trial court overlooked the fact that in the prior action it was found that Detmers, through her conduct and actions, *did agree* to an alternative permanent location for the sculptures (i.e., Tatanka). *Detmers*, 2012 S.D. 35, ¶ 10, 814 N.W.2d at 149. The trial court in the previous action made that finding at the urging of Costner who maintained throughout that action that he and Detmers agreed to permanently (i.e., "for all time") display the sculptures at Tatanka regardless if the resort were ever built. (App. at 133, 135–38; SR at 212, 214–17). That finding was affirmed on appeal and any notion that Costner is discharged from his obligations because Detmers initially refused to do what she was later judicially determined to have done, is devoid of reason and basic sense.

Third, Costner obviously knew of the 2008 Complaint, having defended that action. If he believed the Complaint constituted a breach that discharged him from his contractual obligations, he was obligated to raise that issue in that action. *Piper*, 2019 S.D. 65, ¶ 22, 936 N.W.2d at 804; *Robnik*, 2010 S.D. 69, ¶ 15, 787 N.W.2d at 774. He failed to do so. Instead, he successfully defended on the grounds that he and Detmers agreed to permanently display the sculptures at Tatanka—a conclusion he has spent the entirety of this action trying to avoid.

Finally, to the extent Costner believes the May 5, 2000 contract imposes a duty to agree to alternative locations, he should have sought Detmers agreement to move the sculptures from where they had agreed to permanently display them (i.e., Tatanka). It is undisputed, however, that Costner failed to consult Detmers prior to listing the real estate for sale and stating the sculptures would be relocated. (App. at 035; SR at 73). In any event, the trial court's alternative ruling related to the duty of good faith and fair dealing was error.

IV. The real estate listing and statement concerning relocation of the sculptures is, as a matter of law, an anticipatory breach of the judicially determined agreement to permanently display the sculptures at Tatanka.

An anticipatory repudiation or constructive breach occurs when a party unequivocally indicates that he or she will not perform when performance is due. *Union Pac. R.R. v. Certain Underwriters at Lloyd's of London*, 2009 S.D. 70, ¶ 39, 771 N.W.2d 611, 621; *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, ¶ 31, 714 N.W.2d 884, 894 (additional citations omitted). An anticipatory repudiation "allows the nonbreaching party to treat the repudiation as an immediate breach of contract and sue for damages."[7] *Union Pac. R.R.*, 2009 SD 70, ¶ 39, 771 N.W.2d at 621–22; *Weitzel*, 2006 S.D. 45, ¶ 31, 714 N.W.2d at 894.

Ordinarily, an anticipatory repudiation is a question of fact. 23 Williston on Contracts § 63:45 (4th ed. 2000). However, "[a]n exception applies where the repudiation is in writing, and where the terms are unambiguous, in which case a court may resolve the issue of repudiation as a matter of law." *Id.*; *see also DiFolco v. MSNBC*

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[7] In addition to damages, a breach by repudiation "may give rise to other remedies." Restatement (Second) of Contracts § 236 cmt. a (1981).

Cable L.L.C., 622 F.3d 104, 112 (2d Cir. 2010). Because Costner's real estate listing is an unambiguous writing, this Court can determine the issue of anticipatory repudiation as a matter of law. *G.H.H. Inv., L.L.C. v. Chesterfield Mgmt. Assoc., L.P.*, 262 S.W.3d 687, 695; 23 Williston on Contracts § 63:45 (4th ed. 2000); *see also Rhodes v. Davis*, 628 Fed. Appx. 787, 790 (2d Cir. 2015) (unpublished) ("While the question of anticipatory breach is generally an issue of fact for the jury, where, as here, the relevant communications are in writing and unambiguous, the issue may be decided as a matter of law.").

It is undisputed that Costner listed the real estate upon which the sculptures are located for sale. (App. at 056, 082; SR at 6, 35). The listing expressly excludes the sculptures and states "they will be relocated by the seller." (*Id.*). The listing and the unequivocal statement that the sculptures will be relocated constitute an anticipatory breach as a matter of law. *Byre v. City of Chamberlain*, 362 N.W.2d 69, 75 (S.D. 1985) (contractor who placed an announcement in the newspaper informing residents that if they did not enter into a new contract they would not receive garbage services, held to have breached its contract with the city by anticipatory repudiation).

The trial court held that Detmers was not entitled to summary judgment on this claim because there was not "any proof Costner would relocate the sculptures to a disagreeable location." (App. at 010; SR at 271). The agreement, however, was that the sculptures would be permanently displayed at Tatanka and Costner never sought Detmers's consent to modify that agreement. Furthermore, the suggestion that a party must wait for another party to cure or retract its anticipatory repudiation would, for all intents and purposes, abrogate that cause of action. Indeed, the purpose of anticipatory repudiation is to give the non-breaching party the option to treat the repudiation as a

breach rather than wait for an actual breach to occur. *Union Pac. R.R.*, 2009 S.D. 70, ¶ 39, 771 N.W.2d 611, 621–22; *Weitzel*, 2006 S.D. 45, ¶ 31, 714 N.W.2d 884, 894; *see also Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 632–33 (D.C. Cir. 2017) (citing *Franconia Assocs. v. U.S.*, 536 U.S. 129, 143, 122 S.Ct. 1993, 2002 (2002) (holding anticipatory breach is a "doctrine of accelerated ripeness" because it gives the plaintiff the option to have the law treat the repudiation as an actual breach).

Once Costner repudiated the agreement to permanently display the sculptures at Tatanka, Detmers had no obligation to attempt to change Costner's mind or idly stand by hoping he would not follow through with relocating the sculptures. *Arlington LF, LLC v. Arlington Hosp., Inc.*, 637 F.3d 706, 716 (7th Cir. 2011). Costner, like any other repudiating party, had an opportunity to retract his repudiation. *See* Restatement (Second) of Contracts § 256 (1981). Once the lawsuit was filed, however, retraction was no longer an option. *Id.* at comment c; 15 Williston on Contracts § 43:19 (4th ed. 2000) (observing that under the original and Second Restatement of Contracts, a retraction is untimely if made after the commencement of an action); 4 A. Corbin, Contracts § 980 (1951); *see also Hanson v. Boeder*, 727 N.W.2d 280, 284 (N.D. 2007) ("Adopting [the defendant's] argument would circumvent the law concerning retraction, because the repudiating party would be allowed to retract after a lawsuit has been commenced."); *Johnson v. Benson*, 725 P.2d 21, 25 (Colo. App. 1986) ("The filing of a lawsuit based on repudiation is generally held to constitute a material change of position."); *Glatt v. Bank of Kirkwood Plaza*, 383 N.W.2d 473, 478 (N.D. 1986) ("A retraction of an anticipatory repudiation after the injured party sues for enforcement or damages comes too late."); *Gilmore v. Am. Gas Mach. Co.*, 129 N.E.2d 93, 95 (Ohio Ct. App. 1952) ("Under the

rule, now well established, it appears that the filing of this suit was sufficient to render it impossible for defendant to retract its renunciation.").[8] The real estate listing and statement concerning relocating the sculptures were an unequivocal and unambiguous repudiation of the agreement to permanently display the sculptures at Tatanka. Accordingly, the trial court should be reversed and summary judgment entered for Detmers.[9]

CONCLUSION

The issue in the prior action was whether Costner and Detmers agreed to permanently display the sculptures at Tatanka, even if the resort was never built on that same property. Costner maintained throughout that action that he intended to build the resort, but that the parties agreed that the sculptures would remain at Tatanka "for all time." The trial court adopted Costner's position and this Court affirmed the trial court's finding that the parties agreed to "permanent display of the sculptures at Tatanka."

Consequently, the issue of whether Costner could unilaterally relocate the sculptures from Tatanka was never litigated in the prior action. Nor could that issue have been litigated as it was not relevant to any of the parties' claims in that action. The current issue arose from Costner's listing the real estate for sale and indicating that he would relocate the sculptures. Thus, the operative facts giving rise to this action are different and occurred nearly a decade after the prior action and appeal had concluded.

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[8] It is important to note that Costner has not attempted a retraction, belated or otherwise.

[9] The trial court denied summary judgment on Detmers's request for declaratory judgment on the grounds that Costner's obligation to display the sculptures at an agreed upon location had been discharged. (App. at 012; SR at 273). For the reasons set forth in Section III above, the trial court should be reversed and summary judgment entered for Detmers on this claim.

Detmers's claims are not barred by res judicata and it was error for the circuit court to hold to the contrary.

Costner's successful assertion in the prior action that the parties agreed to permanently display the sculptures at Tatanka provides a permanent impediment to his current claim that he can unilaterally move them from that location. He should be judicially estopped from taking a contrary position in this action as opposed to citing children's literature to show that he meant something other than what he said. "For all time" does not mean for "a long time," and the definitions of words used in judicial opinions do not vary based upon the convenience or subsequent inconvenience of a party.

Similarly, the agreement to permanently display the sculptures at Tatanka cannot, by definition, permit Costner to subsequently move them. Permanence requires not only that the sculptures be placed at that location, but that they remain at that location. This Court recognized that Detmers had display rights with respect to the sculptures and royalty rights with respect to the creation and sale of reproductions of the sculptures. Granting Costner the sole ability to determine if the sculptures were to be displayed and where they would be displayed would nullify her display rights and nullify or significantly impair her royalty rights. Obviously, the sale of reproductions of fine art is significantly dependent upon the ability of potential purchasers to appreciate the originals.

The real estate listing and statement concerning relocating the sculptures are unequivocal and unambiguous indications by Costner of his refusal to permanently display the sculptures at Tatanka. As such, they constitute an anticipatory repudiation of the parties' agreement and summary judgment should have been granted to Detmers.

Paragraph three of the May 5, 2000 contract expressly contemplates the current scenario and it should operate to fully, finally, and permanently resolve the contractual relationship between the parties. The circuit court's decision should be reversed.

Respectfully submitted this 5th day of October, 2022.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ Andrew R. Damgaard

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2013, Times New Roman (12 point) and contains 9,325 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 5th day of October, 2022

WOODS, FULLER, SHULTZ
& SMITH P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of October, 2022, I electronically filed and served Plaintiff/Appellant's Brief through the Odyssey File and Serve system upon the following

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APPENDIX

1.	Memorandum Decision and Order	App. 001-013
2.	Affidavit of Andrew R. Damgaard	App. 014-039
3.	Defendant's Proposed Memorandum Decision and Order	App. 040-052
4.	Complaint	App. 053-080
5.	Answer	App. 081-086
6.	Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment	App. 087-099
7.	Reply Brief in Support of Plaintiff's Motion for Summary Judgment	App. 100-107
8.	Plaintiff's Proposed Memorandum and Order	App. 108-120
9.	Findings of Fact and Conclusions of Law	App. 121-131
10.	Defendant's Proposed Findings of Fact and Conclusions of Law	App. 132-141
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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

PEGGY A. DETMERS,	)	FILE NO. 40CIV22-17
	)	
Plaintiff,	)	
	)	**MEMORANDUM DECISION AND ORDER**
v.	)	
	)	
KEVIN COSTNER,	)	
	)	
Defendant.	)	

This matter comes before this Court on the parties' cross-motions for summary judgment. A hearing was held at the Lawrence County Courthouse on July 22, 2022, at 10:30 a.m. where the Plaintiff, Peggy Detmers (Detmers), was personally present and was represented by her attorneys, Andrew Damgaard and A. Russell Janklow. The Defendant, Kevin Costner (Costner), was represented by his attorneys Catherine A. Seeley and Marty J. Jackley. The Court, having reviewed the parties' briefs and having heard the arguments of counsel, issues the following Memorandum Decision and Order.

FACTUAL BACKGROUND

The material facts relating to Costner's Motion for Summary Judgment are not in dispute. The pertinent issues were litigated, decided, and affirmed by courts of competent jurisdiction more than ten years ago. This Court will not permit the parties to relitigate matters previously decided in the prior action. *Wells v. Wells*, 2005 S.D. 67, ¶ 15, 698 N.W.2d 504, 508.

In the early 1990s Costner sought to build a five-start resort on real property he owned near Deadwood, South Dakota, to be called The Dunbar. He commissioned Detmers to create a set of sculptures to be displayed at the resort. When The Dunbar had not been built by the late 1990s, Costner and Detmers negotiated and entered into a written contract for the completion of

the sculptures regardless of whether The Dunbar would be built. The contract dated May 5, 2000, consisted of five paragraphs and outlined the parties' varying interests in the sculptures and their reproductions.

Relevant to this matter are the second, third, and fourth paragraphs of the contract.[1] The second paragraph provides that Costner "will be the sole owner of all rights in the sculptures, including the copyright," and provides Detmers with a continuing interest the sales of reproductions of the sculptures in that she "will always be attached through [her] royalty participation." The third paragraph addresses what may happen in the event The Dunbar is never built. Paragraph three provides in full:

> Although I [(Costner)] do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere, I will give you [(Detmers)] 50% of the profits from the sale of the one and one-quarter life scale sculptures after I have recouped all my costs incurred in the creation of the sculptures and any such sale. The sale price will be at our (sic) above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders).

Paragraph four of the contract further addresses the display of the sculptures and provides:

> We will locate a suitable site for displaying the sculptures if The Dunbar is not under construction within three (3) years after the last sculpture has been delivered to the mold makers. In the meantime, until the sculptures are put on display, I will permit you to market and sell reproductions and you can retain eighty percent 80% of the gross retail sales price and pay 20% to me. Once the sculptures are put on public display in public view, agreed upon by both parties (but with the final decision to be made by me if we do not agree); the percentages will reverse, 80% of the gross retail sales price to me and 20% to you. The marketing must proceed as outlined below.

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[1] The first paragraph of the parties' contract provides that Detmers shall receive additional compensation for her work; that paragraph is not at issue in the current litigation. Paragraph five of the contract sets forth certain marketing obligations; similarly, that paragraph is not at issue in the current litigation.

The Dunbar had not been built, nor was it under construction, by the early 2000s. In order to comply with the contract, Costner located an alternative site on land intended to be part of The Dunbar at which to display the sculptures. Costner proposed the location to Detmers who agreed to the display and assisted with the placement of the sculptures at the site. To accompany the display and to enhance visitors' experiences, Costner erected several amenities at the site, including a visitor center, gift shop, café, interactive museum, and nature walkways. The display along with the other amenities came to be known as Tatanka.

PRIOR LITIGATION

In 2008, Detmers initiated suit against Costner claiming that he breached their May 5, 2000 contract because The Dunbar had not been built and asserting that Detmers did not agree to the placement of the sculptures at Tatanka. The litigation focused primarily on paragraph three of the parties' May 5, 2000 contract.

Despite paragraph three of the May 5, 2000 contract, which indicated that the sculptures could be agreeably displayed elsewhere if The Dunbar was not built within ten years, Detmers's verified complaint dated December 9, 2008, unequivocally stated "Detmers has not agreed and *will not agree* to an alternative permanent location for the monument." *See* Verified Complaint and Demand for Jury Trial, ¶ 27, originally filed in Pennington County file Civ. 08-2354 (emphasis added).

Throughout the course of that litigation, Detmers advanced two arguments. First, she argued that she did not agree to display the sculptures at Tatanka past 2010 if The Dunbar had not been built. *See* Plaintiff's Proposed Findings of Fact and Conclusions of Law, ¶ 39, filed in Lawrence County Civ. 09-60. Second, she argued that Tatanka did not constitute "elsewhere" under the terms of the May 5, 2000 contract because Tatanka was located on a portion of real property originally intended as part of The Dunbar. *See Detmers v. Costner*, 2012 S.D. 35, ¶ 17,

814 N.W.2d 146, 150. In response to Detmers's assertion that her consent to the sculptures' placement at Tatanka was temporary and contingent, Costner argued that Detmers agreed to place the sculptures at Tatanka for the long term, or permanently, thereby satisfying paragraph three of the parties' May 5, 2000 contract. *See* Defendant's Proposed Findings of Fact and Conclusions of Law, ¶ 55, filed in Lawrence County Civ. 09-60.

The circuit court determined that the contract was unambiguous and after a bench trial, concluded that Detmers "was agreeable to the sculptures' placement at Tatanka for the long term," and that "Costner has fully performed under the terms of the contract." *See* Trial Court's Findings of Fact and Conclusions of Law, ¶¶ 14-15, filed in Lawrence County file Civ. 09-60. Ultimately the circuit court entered a final judgment in favor of Costner, which the South Dakota Supreme Court affirmed. *Detmers*, 2012 S.D. 35, 814 N.W.2d 146.

POST APPEAL FACTUAL BACKGROUND

Since the South Dakota Supreme Court's decision in the prior action, the sculptures have remained displayed at Tatanka. Recently, a real estate listing was posted for the land upon which Tatanka sits. The real estate listing states, "Tatanka statues are not included- will be relocated by seller." After becoming aware of that listing, Detmers again brought suit against Costner alleging breach of contract under a theory of anticipatory repudiation and alternatively seeking a declaratory judgment. *See* Complaint.

DISCUSSION

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SDCL 15-6-56(c). The moving party must demonstrate the lack of a genuine issue of material fact and show entitlement to judgment as a matter of law. *Brevet Int'l, Inc. v.*

Great Plains Luggage Co., 2000 S.D. 5, ¶12, 604 N.W.2d 268, 271 (quotation omitted). "The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however must present specific facts showing that a genuine, material issue for trial exists." *Millard v. City of Sioux Falls*, 1999 S.D. 18, ¶ 8, 589 N.W.2d 217, 218 (quoting *Walther v. KPKA Meadowlands Ltd. Partnership*, 1998 S.D. 78, ¶ 14, 581 N.W.2d 527, 531).

Res Judicata

As an initial matter, prior to reaching the merits, Costner argues that Detmers's suit is precluded under the theory of res judicata because the earlier court case concluded that Costner had fully performed under the terms of the contract. "The doctrine of res judicata is premised on two maxims: A person should not be twice vexed for the same cause and it is for the public good that there be an end to litigations." *People ex rel. L.S.*, 2006 S.D. 76, ¶ 23, 721 N.W.2d 83, 90 (cleaned up and citation omitted). Four elements must be present to invoke the preclusive effect of res judicata: "(1) a final judgment on the merits in an earlier action; (2) the question decided in the former action is the same as the one decided in the present action; (3) the parties are the same; and (4) there was a full and fair opportunity to litigate the issues in the prior proceeding." *People ex rel L.S.*, 2006 S.D. 76, ¶ 22, 721 N.W.2d 83, 89-90 (citation omitted). "In examining whether these elements are present, a court should construe the doctrine liberally, unrestricted by technicalities." *Id.*

It is evident that the parties have litigated these issues before. The parties previously asked the circuit court and ultimately the South Dakota Supreme Court to interpret their respective obligations under the May 5, 2000 contract as it related to the placement of the sculptures. The prior case (1) resulted on a final judgment on the merits; (2) decided whether the parties had fully performed under paragraph three of the contract; (3) involved the same parties

to the current case; and (4) provided a full and fair opportunity to litigate the terms of the contract and their respective responsibilities thereunder. As the circuit court held in the prior action, Costner has fully performed under paragraph three of the May 5, 2000 contract by having placed the sculptures at Tatanka for an indefinite time.

Detmers attempts to undermine the prior court's holding by drawing on its, and the South Dakota Supreme Court's, use of the word "permanent." While the word "permanent" was used to describe the sculptures' placement at Tatanka by both Costner and the South Dakota Supreme Court in the prior action, this Court finds that "permanent" does not mean eternal or perpetual as urged by Detmers. It is apparent that the use of the word "permanent" or "final" in the prior proceeding was used to renounce Detmers's contention that the sculptures' placement at Tatanka was only intended to be temporary. "Permanent" is defined by Merriam-Webster as "continuing or enduring without fundamental or marked change," and by Merriam-Webster Kids as "lasting or meant to last for a long time: not temporary." PERMANENT, Merriam-Webster, available at https://www.merriam-webster.com/dictionary/permanent (last accessed August 11, 2022).[2] Applying this ordinary meaning of the word "permanent," the courts in the prior action found that when the parties agreed to place the sculptures at Tatanka, they agreed that the sculptures would continue there without fundamental change for a long time.[3] As the courts previously

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[2] This Court notes that "permanent" cannot be equated with eternal or perpetual as Detmers seems to imply. *See* ETERNAL, Merriam-Webster, available at https://www.merriam-webster.com/dictionary/eternal (last accessed August 11, 2022) (defining eternal as "having infinite duration...lasting forever: having no beginning and no end"); PERPETUAL, Merriam-Webster, available at https://www.merriam-webster.com/dictionary/perpetual (defining perpetual as "continuing forever").

[3] In addition to the ordinary meaning of "permanent," when the term is used in legal jargon, it rarely, if ever, means a situation that is not subject to change. *See e.g.* PERMANENT ALIMONY, Black's Law Dictionary (11th ed. 2019); PERMANENT EMPLOYMENT, Black's Law Dictionary (11th ed. 2019); PERMANENT DISABILITY, Black's Law Dictionary (11th ed. 2019).

determined, Costner has fully performed his display obligation under paragraph three of the May 5, 2000 contract. Accordingly, Costner has satisfied his obligation under that paragraph, no continuing duty thereunder exists, and he is entitled to summary judgment.

Contract Interpretation

Even if the issues in the prior proceeding were not the same as those presented in the current action, Costner's Motion for Summary Judgment is still granted based upon an interpretation of the May 5, 2000 contract's plain language. As the South Dakota Supreme Court pointed out in the prior proceedings, "Contract interpretation is a question of law," and "[w]hen interpreting a contract, [a court] looks to the language that the parties used in the contract to determine their intention." *Detmers*, 2012 S.D. 35, ¶ 20, 814 N.W.2d 146, 151 (cleaned up and citations omitted). "When the words of a contract are clear and explicit and lead to no absurd consequences, the search for the parties' common intent is at an end." *Id.* (quotation omitted). Courts "may neither rewrite the parties' contract nor add to its language." *Id.* (quoting *Culhane v. W. Nat'l Mut. Ins. Co.*, 2005 S.D. 97, ¶ 27, 704 N.W.2d 287, 297.

In addition to reviewing the plain language of a contract provision, "[a] contract is to be examined as a whole and all provisions read together to construe the contract's meaning." *City of Watertown v. Dakota, Minnesota & Eastern R. Co.*, 1996 S.D. 82, ¶ 18, 551 N.W.2d 571, 575; *Friesz ex re. Friesz v. Farm & City Ins. Co.*, 2000 S.D. 152, ¶10, 619 N.W.2d 677, 680 ("A contract is to be examined and read in its entirety with all provisions being read together to construe its meaning."). When one paragraph of a contract does not provide sufficient context on an issue, it is appropriate to look to other paragraphs within a contract to give meaning to terms. *See Kimball Investment Land, Ltd. v. Chmela*, 2000 S.D. 6, 604 N.W.2d 289 (2000) (looking to different paragraphs in a contract to understand time frames discussed in other paragraphs of the same contract).

The parties' May 5, 2000 contract contains only five short paragraphs. The parties' intent and obligations can be ascertained by looking to the language used in those paragraphs. Some provisions in the contract carry continuing obligations while others have contingent or dischargeable duties.

Paragraph three of the parties' contract provides both a dischargeable duty on Costner's part and a contingent provision if he does not meet that duty. The paragraph states in part "if The Dunbar is not built within ten (10) years *or the sculptures are not agreeably displayed elsewhere,* I will give you 50% of the profits from the sale of the one and one-quarter life scale sculptures... [and] I will assign back to you the copyright of the sculptures." Only if both (1) The Dunbar is not built and (2) the sculptures are not agreeably displayed elsewhere within ten years after the May 5, 2022 contract would the sale language of the contract have any possible effect.[4] As the lower court found in the prior litigation, the sculptures had been agreeably displayed elsewhere at Tatanka within that ten year time frame, and they have remained there for many years since. Accordingly, Costner affirmatively satisfied his duty under paragraph three, and the contingent obligation was discharged.

The language of the contract does not indicate that the parties understood or intended the "agreeably displayed elsewhere" language to constitute a continuing right or obligation. In fact, when reading the contract as a whole, the provisions surrounding paragraph three suggest the limited nature of Detmers's input on the sculptures' display. Paragraph two of the May 5, 2000

[4] The context of the provision suggests that a proper reading of the paragraph requires that the sculptures either be placed at The Dunbar or be agreeably displayed elsewhere within ten years of the parties' execution of the contract. *See Argus Leader Media v. Hogstad*, 2017 S.D. 57, ¶¶ 8-9, 902 N.W.2d 778, 781-82 (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 146 (2012)) (discussing the contextual nature of modifying clauses).

contract evidences that the parties knew how to provide for continuing rights and responsibilities. It provides that Costner is "the sole owner of all rights in the sculptures, including the copyright," and that Detmers would "always be attached through [her] royalty participation." Had the parties intended for Detmers to be able to have input on the placement of the sculptures in perpetuity, they could have drafted the language accordingly. They did not.[5]

The language used by the parties evidences their clear intent that once the sculptures are agreeably displayed elsewhere, Costner's obligations under paragraph three of the May 5, 2000 contract were satisfied and he was relieved from any further performance under that obligation. As this Court and the prior court find Costner has fully performed under that provision, there exists no basis for Detmers's current action, and Costner is entitled to summary judgment.

Anticipatory Repudiation

While Detmers maintains that Costner committed an anticipatory repudiation of the May 5, 2000 contract by publishing a real estate listing which indicated the "Tatanka statues...will be relocated by seller," her assertions are unpersuasive for two reasons: (1) the real estate listing does not unequivocally indicate a breach; and (2) Detmers constructively breached her obligations under the contract first, thereby releasing Costner from his obligations under the same. Even if this Court were to deny Costner's Motion for Summary Judgment, Detmers is not entitled to summary judgment as a matter of law because there are disputed facts material to her claim.[6]

[5] Paragraph four of the parties' May 5, 2000 contract further provides that Costner has greater authority relating to the placement of the sculptures, in that "the final decision [relating to the sculptures' placement is] to be made by [Costner] if [the parties] do not agree." When reading the contract as a whole, paragraph four evidences the parties' intent that Costner have greater decision-making authority when placing the sculptures.

[6] Detmers's current cause of action implies that Costner cannot remove the sculptures from Tatanka based on the parties' prior agreement to place them at Tatanka. However, paragraph

A repudiation of a contract occurs when a party unequivocally indicates that it will not perform its obligations when performance is due. *Union Pac. R.R. v. Certain Underwriters at Lloyd's London*, 2009 S.D. 70, ¶ 39, 771 N.W.2d 611, 621-22. While the real estate listing published by a third party may seem to indicate that the sculptures will be relocated by the seller if the real property is sold, Detmers has not proven that such relocation would be a *breach* of the parties' contract. Even if the contract is interpreted consistent with Detmers's position, Costner and Detmers could agree to an alternate location for the sculptures. Without any proof that Costner will relocate the sculptures to a disagreeable location, the real estate listing published by a third party cannot be an *unequivocal* indication that a breach is imminent.

As indicated above, for purposes of Detmers's Motion for Summary Judgment, "[t]he evidence must be viewed most favorably to [Costner] and reasonable doubts should be resolved against [Detmers]." *Millard*, 1999 S.D. 18, ¶ 8, 589 N.W.2d at 218. Here, and especially considering the evidence in a light most favorable to Costner, Detmers has failed to overcome her burden to establish that Costner has unequivocally refused to fulfill his obligations within the contract. Thus, Detmers's Motion for Summary Judgment must be denied even if Costner's Motion was not granted.

Furthermore, even if this Court had not found, as it did, that Costner already satisfied paragraph three of the parties' contract as discussed above, Costner is relieved from any further performance which may exist under that paragraph because Detmers has committed an anticipatory repudiation of that provision herself. A fair reading of paragraph three would

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three of the parties' May 5, 2000 contract does not require the sculptures to be placed at a particular location as Detmers maintains. To the extent Detmers maintains that the secondary implied agreement to place the sculptures at Tatanka gives rise to her current cause of action, significant issues of material fact exist relating to that supposed agreement, particularly as to whether she may even seek the relief she requests.

indicate that the parties would in good faith seek an agreeable display of the sculptures if The Dunbar did not come to fruition within ten years. *See Table Steaks v. First Premier Bank, N.A.* 2002 S.D. 105, ¶ 16, 650 N.W.2d 829, 834 ("The general rule is that every contract contains an implied covenant of good faith and fair dealing.") (citation omitted). In her Verified Complaint dated December 9, 2008, Detmers asserted that she "has not agreed and *will not agree to an alternative permanent location for the monument.*" *See* Verified Complaint and Demand for Jury Trial, ¶ 27, originally filed in Pennington County file Civ. 08-2354 (emphasis added).

As Detmers herself argues, when an anticipatory repudiation based on a party's unequivocal indication that she will not perform or will refuse to perform when performance is due, may be treated as an immediate breach. *Union Pac. R.R.*, 2009 S.D. 70, ¶ 39, 771 N.W.2d 611, 621-22. Where the repudiation is in writing, and where the terms are unambiguous, a court may resolve the issue of repudiation as a matter of law. *DiFolco v. MSNBC Cable, LLC*, 622 F.3d 104, 112 (2d Cir. 2010). Detmers's December 9, 2008 Verified Complaint is a notarized writing that affirmatively, unequivocally states that she will refuse to perform her good faith obligation to consider an alternative agreeable display location for the sculptures. Accordingly, she herself anticipatorily repudiated her obligation under paragraph three of the parties' contract and Costner should be relieved from any obligations he had thereunder as well. *See Byre v. City of Chamberlain*, 362 N.W.2d 69, 75 (S.D. 1985) (finding that when a garbage collector committed an anticipatory repudiation of his agreement with the city, that the city was free to contract with others for the services he indicated he would not perform).

Declaratory Judgment

"Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." SDCL 21-

24-1. "A matter is sufficiently ripe [for a declaratory judgment] if the facts indicate imminent conflict." *Boever v. South Dakota Bd. Of Accountancy*, 526 N.W.2d 747, 750 (S.D. 1995).

A review of the contract language, as discussed above, reveals that Detmers has no continuing rights in the placement or display of the sculptures at issue. Costner fully performed his contractual obligation under paragraph three of the parties' May 5, 2000 contract and no duties thereunder remain outstanding. As Costner owes Detmers no continuing duty under paragraph three of that contract, the declaratory judgment that Detmers seeks leads only to the conclusion that she has no continuing rights relating to the placement of the sculptures.

For the reasons stated herein, it is hereby

ORDERED that Defendant's Motion for Summary Judgment is granted; it is further

ORDERED that Plaintiff's Motion for Summary Judgment as to her claim for anticipatory repudiation is denied; and it is further

ORDERED that Plaintiff's Motion for Summary Judgment as to her claim for declaratory judgment is granted, in that Detmers has no continuing contractual rights or interest in the placement of the sculptures at issue.

Dated this 31st day of August, 2022.

BY THE COURT:

Honorable Eric Strawn
Circuit Court Judge

ATTESTED:
Clerk of Courts

Deputy

UNIFIED JUDICIAL SYSTEM
JUSTICE
STATE OF SOUTH DAKOTA

8/31/2022 12:29 PM FILED LAWRENCE COUNTY

STATE OF SOUTH DAKOTA COUNTY OF LAWRENCE	)) SS)	IN COURT FOURTH JUDICIAL CIRCUIT
PEGGY A. DETMERS, PLAINTIFF, vs. KEVIN COSTNER, DEFENDANT,	)))))	40CIV22-000017 AFFIDAVIT OF SERVICE BY MAIL/EMAIL

I, Carol Latuseck, being sworn, state that on the 31ST day of August 2022, I served the following papers: MEMORANDUM DECISION AND ORDER; from FILE # 40CIV22-00017; by:

X emailing true copies of the document(s) to Russ Janklow, Attorney for the Plaintiff, at rjanklowabdallah.com and Marty Jackley, Attorney for the Defendant, at mjackley@gpna.com and receiving a delivery receipt for the same confirming the email was delivered to the receipt's mailboxes.

Dated on this 31st day of August 2022.

Carol Latuseck, Clerk of Courts

UNIFIED JUDICIAL SYSTEM JUSTICE STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

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PEGGY A. DETMERS,

Plaintiff,

v.

KEVIN COSTNER,

Defendant.

40CIV22-000017

AFFIDAVIT OF ANDREW R. DAMGAARD

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

Andrew R. Damgaard, being first duly sworn, states as follows:

1. Attached as **Exhibit A** is a true and correct copy of the trial court's Findings of Fact and Conclusions of Law in Peggy Detmers and Detmers Studio, Inc. v. Kevin Costner and The Dunbar, Inc., (Civ. 09-60).

2. Attached as **Exhibit B** is a true and correct copy of the May 5, 2000 contract between the Plaintiff and the Defendant.

3. Attached as **Exhibit C** is a true and correct copy of the Defendant's responses to the Plaintiff's discovery requests.

{04728427.1}

Dated this 17th day of May, 2022.

Andrew R. Damgaard

Subscribed and sworn to before me
this 17th day of May, 2022.

Notary Public – South Dakota

ANNA B. WOJCIECHOWSKI
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL
My Commission Expires 3/12/2026

CERTIFICATE OF SERVICE

I certify that on the 17th day of May, 2022, a copy of the foregoing was electronically filed and served through the Odyssey File and Serve system upon the following individual:

Marty J. Jackley
GUNDERSON, PALMER, NELSON
& ASHMORE, LLP
111West Capital Ave., Suite 230
Pierre, SD 57501
(605) 494-0105
mjackley@gpna.com

/s/ Andrew R. Damgaard
Andrew R. Damgaard

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

****

PEGGY DETMERS AND DETMERS STUDIOS, INC.,

Plaintiffs,

vs.

KEVIN COSTNER AND THE DUNBAR, INC.,

Defendants.

Civ. 09-60

FINDINGS OF FACT AND CONCLUSIONS OF LAW

****

A trial to the Court was held on February 22 and 23, 2011, at the courtroom of the Lawrence County Courthouse, Deadwood. Plaintiffs appeared personally and by counsel, Mr. A. Russell Janklow and Mr. Andrew R. Damgaard, Sioux Falls. Defendants appeared personally and by counsel, Mr. James S. Nelson and Mr. Kyle L. Wiese, Rapid City. The Court having heard the testimony of witnesses and having reviewed the briefs and exhibits, issues the following FINDINGS OF FACT AND CONCLUSIONS OF LAW.

FINDINGS OF FACT:

1. Any Finding of Fact may be deemed to be a Conclusion of Law and any Conclusion of Law may be deemed to be a Finding of Fact.

2. The Court's Memorandum Decision dated 6-28-11, is herein incorporated by this reference.

3. Beginning in the 1990s, Kevin Costner envisioned building a five-star hotel and resort on real property north of

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SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

Exhibit A

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Deadwood. This resort was to be named after one of his movie characters and called The Dunbar.

4. Costner planned to include sculptures of bison at the entryway to the hotel.

5. Costner commissioned artist Peggy Detmers to build the bison sculptures. The final plans for the sculptures called for 14 bison and 3 Lakota warriors mounted on horseback. The sculptures are 25 percent larger than life scale.

6. The parties agreed that Detmers would be paid $250,000 and would receive royalty rights in fine art reproductions of the sculptures that were to be marketed and sold at the gift shop/gallery at The Dunbar hotel.

7. In the late-1990s and the early part of 2000, Detmers stopped working on the sculptures because The Dunbar had not been built. Detmers and Costner negotiated additional compensation to Detmers in exchange for completion of the sculptures and entered into an express written contract on May 5, 2000. The contract provided an additional payment of $60,000 for Detmers (increasing her total compensation for the sculptures to $310,000), royalty rights on reproductions, and display of the sculptures. This contract is at the center of the parties' current dispute, and paragraph 3 provides:

> Although I do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere, I will give you 50% of the profits from the sale of the

> one and one-quarter life scale sculptures after I have recouped all my costs incurred in the creation of the sculptures and any such sale. The sale price will be at our [sic] above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders).

8. Because the resort had not been built in the early 2000s, the parties began looking for alternate locations to display the sculptures pursuant to a display requirement in paragraph 4 of the May 5, 2000 agreement. Detmers considered locations in Hill City, while Costner consider locations in and around Deadwood.

9. Ultimately, Costner realized that he could place the sculptures on a portion of the real property he owned and intended for The Dunbar.

10. Costner called Detmers on January 23 or 24, 2002 to let her know that he was considering placing the sculptures at a site on The Dunbar property. At that location, Costner knew he could dedicate a site for the sculptures and provide them with protection, something that several of the temporary locations he considered could not.

11. Detmers received a phone call from Costner on January 23 or 24, 2002.

12. On January 29, 2002, the project's architect, Patrick Wyss, sent a letter to Costner confirming the beginning of the

design process on this project, which came to be known as Tatanka.

13. Wyss was instructed by Costner to keep Detmers informed and involved. Beginning in June 2002, Detmers was influential in the placement of the sculptures on the Tatanka property.

14. In March 2003, the "mock-up" of the sculpture placement began. Numerous photos were admitted into evidence depicting Detmers' involvement in the "mock-up" and final placement of the sculptures.

15. The Court finds that the use of the "mock-ups" was Detmers' idea. Essentially this entailed placing temporary plywood cut-outs of the sculptures where the final sculptures would ultimately be installed. Using these wood "mock-ups," the design could be easily changed and rearranged before the final sculptures had been delivered for placement. Through the use of the "mock-ups" the exact location of each piece could be pinpointed using GPS technology and staking for final placement of each sculpture.

16. Costner ceded many decisions to Detmers because, as the artist, she "had a place of authority" and "heavy influence" regarding sculpture placement.

17. Numerous media articles from 2002 and 2003 quote Detmers as being "excited" and "relieved" about the sculptures

placement at Tatanka. Those same articles characterize Tatanka as a "stand-alone" entity, completely separate from The Dunbar.

18. Tatanka consists of a visitor's center with a gift shop and café, interactive museum, nature walkways, and the sculptures.

19. Costner spent approximately $6,000,000 building this attraction.

20. Tatanka was dedicated and had its public grand opening on June 21, 2003. Both Costner and Detmers spoke at the grand opening.

21. In December 2008, Detmers brought suit against Costner alleging breach of contract. In her prayer for relief she requested specific performance. She alleges that because The Dunbar was not built within ten years and the sculptures are not agreeably displayed elsewhere she is entitled to 50 percent of the proceeds from the sale of the sculptures.

CONCLUSIONS OF LAW:

1. The Court has jurisdiction over the subject matter and personal jurisdiction over the parties.

2. As this Court has previously ruled, the terms of this contract are clear and unambiguous. Memorandum Decision and Order at 5 (December 17, 2010) ("The contract language is not ambiguous."). Said Memorandum Decision is incorporated herein by this reference.

3. When terms are unambiguous, courts construe contract terms using the plain and ordinary meaning of the words. *Kjerstad Realty, Inc. v. Bootjack Ranch, Inc.*, 2009 SD 93, ¶¶ 10-11, 774 NW2d 797, 800-01; *Prudential Kahler Realtors v. Schmitendorf*, 2003 SD 148, ¶¶ 10-11, 673 NW2d 663, 666 ("[T]his Court will apply the 'plain and ordinary meaning' of the disputed term." (other citations omitted)).

4. "Elsewhere," as used in the contract, clearly means at a site other than The Dunbar. This is in accord with the regular meaning of that term. *See* BLACK'S LAW DICTIONARY 468 (5th ed. 1979) (defining elsewhere as "in another place; in any other place"); WEBSTER'S NEW COLLEGIATE DICTIONARY 404 (9th ed. 1986) (defining elsewhere as "in or to another place").

5. Because The Dunbar has not been built, any site is elsewhere, i.e., somewhere other than The Dunbar. The placement of the sculptures at Tatanka is elsewhere. It is "in another place[,]" separate and distinct, from the non-existent Dunbar hotel and resort.

6. In determining whether Costner and Detmers agreed to the sculptures' placement at Tantanka, the conduct of the parties is controlling. *See Weller v. Spring Creek Resort*, 477 NW2d 839, 841 (SD 1991) (recognizing that the existence of an implied contract is determined by the parties conduct); *see also Huffman v. Shevlin*, 72 NW2d 852, 855 (SD 1955) (considering "all

the circumstances surrounding the execution of the writing and the subsequent acts of the parties" when determining the parties' intent).

7. Because the issue in this case, whether the sculptures were agreeably displayed elsewhere, requires the Court to determine if the parties made an agreement beyond that which is necessary to create the May 5, 2000 contract, the law of implied contracts is applicable. The Court must determine whether the parties' words, actions, and non-actions constituted a further agreement, i.e. an implied contract, regarding the placement of the sculptures somewhere other than The Dunbar. *See In re Estate of Regennitter*, 1999 SD 26, ¶ 12, 589 NW2d 920, 924 ("We look to the totality of the parties' conduct to learn whether an implied contract can be found." (other citations omitted)); *Weller*, 477 NW2d at 841.

8. The language of the contract contemplates that The Dunbar may not be built. The contract states, "[a]lthough I do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years . . . ." Therefore, the contract acknowledges the fact that The Dunbar may not be built.

9. Testimony from Costner and others associated with The Dunbar and Tatanka projects indicates that although Costner has been attempting to build The Dunbar for years, and continues to

try to build it, he never promised Detmers or anyone else that it would actually be built.

10. Any reliance by Detmers on a promise or guarantee, from Costner or his associates, that The Dunbar would be built is unreasonable. *See Vander Heide v. Boke Ranch, Inc.*, 2007 SD 69, ¶ 30, 736 NW2d 824, 834 (finding that "alleged reliance was not in any way justified" (citing Werner v. Norwest Bank South Dakota N.A., 499 NW2d 138, 141-42 (SD 1993))); *Garrett v. BankWest, Inc.*, 459 NW2d 833, 848 (SD 1990) (rejecting a promissory estoppel claim because the alleged reliance was unreasonable).

11. Detmers actions following the decision to place the sculptures at Tatanka indicate that she agreed to display them at that location. Detmers was notified of the plan to place the sculptures at Tatanka in January 2002, she was involved as part of the construction team, she had significant involvement in the "mock-up" and placement of the sculptures in early 2003, and she gave a speech at the Tatanka grand opening in June 2003. Detmers documented her involvement in this project by use of her own photographer during the construction of Tatanka.

12. Detmers testified that she never told Costner that she disagreed with the placement of the sculptures at Tatanka:

> Q: . . . I asked you, did you ever personally tell Kevin that you did not want the sculptures at Tatanka?
> A: As I never thought it would be a stand-alone thing, so I never --

> Q: You didn't tell him, did you.
> A: I told him - I kept asking him, "Is the Dunbar going to be here?" and he said, "Yes." I go, "Okay."

Tr. Trans. Vol. 1, 95:7-13 (February 22, 2011). Detmers did not directly answer the question posed by Costner's counsel regarding whether she told him that she didn't want the sculptures at Tatanka, but based on the Court's observation of the witness during cross-examination, the Court finds that she did not make any definitive statement to Costner stating that she did not want the sculptures placed at Tatanka. Furthermore, Costner testified as follows on the same issue:

> Q: So at any time then did Peggy ever just tell you flat out, "I object to [Tatanka]. I don't want to do it. I don't agree"?
> A: No.

Tr. Trans. Vol. 2, 343:21-24 (February 23, 2011).

13. Her significant involvement in the Tatanka project and her failure to tell Costner or anyone else that she did not agree with placement at Tatanka indicate that she was agreeable to the sculptures' placement at Tatanka for the long term.

14. Costner's funding and building of Tatanka is further evidence of an agreeable display. It is unreasonable to think that Costner would expend millions of dollars in creating this attraction if the parties did not agree that this would be the final display area for the sculptures. To conclude that this was a unilateral decision by Costner that was not agreed upon by Detmers would cause an absurd result; namely that Costner would

have spent $6,000,000 to place the sculptures at Tatanka and if The Dunbar was not built, the sculptures be moved someplace else that was agreeable to them both or that the sculptures be sold upon Detmers' demand. This Court cannot endorse such an absurd result. *See Nelson v. Schellpfeffer*, 2003 SD 7, ¶ 8, 656 NW2d 740, 743.

15. Costner has fully performed under the terms of the contract. The words, actions, and inactions of both parties indicate an agreement to the display of the sculptures at Tantanka.

16. Detmers has failed to prove that Coster breached the May 5, 2000 contract.

Therefore, it is hereby ORDERED:

That Detmers' prayer for relief is DENIED.

Counsel for Costner shall prepare a Judgment consistent with the Court's Findings of Fact and Conclusions of Law and Memorandum Decision within 14 days.

Dated this 28th day of June, 2011.

BY THE COURT:

Hon. Randall L. Macy
Circuit Court Judge

FILED
JUN 28 2011
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

ATTEST:

Clerk of Courts

Deputy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a true and correct copy of the FINDINGS OF FACT AND CONCLUSIONS OF LAW in the above entitled matter upon the persons herein next designated all on the date below shown, by depositing a copy thereof in the United States Mail at Deadwood, South Dakota, postage prepaid, in envelopes addressed to said addressees, to-wit:

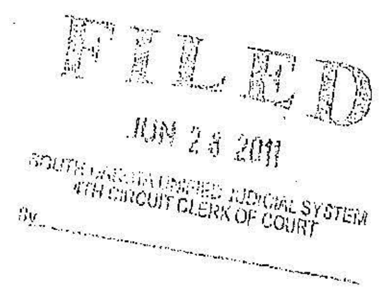
Mr. A. Russell Janklow
Mr. Andrew R. Damgaard
Attorneys at Law
1700 W. Russell Street
Sioux Falls, SD 57104

Mr. James S. Nelson
Mr. Kyle L. Wiese
Attorneys at Law
P.O. Box 8045
Rapid City, SD 57709-8045

which addresses are the last addresses of the addressees known to the subscriber.

Dated this 28th day of June, 2011.

Cindy Gackle
Cindy Gackle
Scheduling Clerk



Kevin Costner

May 5, 2000

Peggy Detmers
Detmers Studios
13488 Shelter Drive
Rapid City, South Dakota 57702

Dear Peggy,

1. In order to assist you during your transition period to other work, I will pay you $60,000 ($5,000 per month on the first day of each month over the next year) once the last sculpture has been delivered to the mold makers. I will even make $10,000 of this a non-taxable gift to you so that you will only have to pay taxes on $50,000. If we are able to sell the "Ridge Runners" (H&R1, BB1, CW2, and CF3) or the "Collision" (H&R3 and BB13) in the life scale to any party at or above standard bronze market pricing, the $60,000 will have not to be paid. The receipts from any such sale will be divided as outlined in clause 2.

2. Although I will be the sole owner of all rights in the sculptures, including the copyright, in the sculptures, you will always be attached through your royalty participation. Because I believe that the sculptures are a valuable asset, I feel strongly that it is important that you maintain your 20% of gross retail price royalty on future sales of fine art reproductions (5% of gross retail price royalty on mass market reproductions selling for under $200). However, should you desire to sell that interest to me at some point in the future, I would be happy to discuss that with you in good faith.

3. Although I do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere, I will give you 50% of the profits from the sale of the one and one-quarter life scale sculptures after I have recouped all my costs incurred in the creation of the sculptures and any such sale. The sale price will be at our above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders).

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Exhibit B

4. We will locate a suitable site for displaying the sculptures if The Dunbar is not under construction within three (3) years after the last sculpture has been delivered to the mold makers. In the meantime, until the sculptures are put on display, I will permit you to market and sell reproductions and you can retain eighty percent 80% of the gross retail sales price and pay 20% to me. Once the sculptures are put on public display in public view, agreed upon by both parties (but with the final decision to be made by me if we do not agree), the percentages will reverse, 80% of the gross retail sales price to me and 20% to you. The marketing must proceed as outlined below.

5. After the sculptures are completed and prior to the resort's completion, I will, upon your request, advance the costs necessary to produce, photograph and advertise up to two (2) maquette limited editions (not to exceed $7,500 in the aggregate), provided that such advances will be recoupable out of sales proceeds and the royalties paid as indicated above. A minimum of two Southwest Art full page, full color ads are to be purchased (not to exceed $5,220 in the aggregate) within this first year (2000), to market one of the editions, it being understood that the amounts paid for such ads will be recoupable out of the sales proceeds.

If the foregoing is acceptable, please sign two (2) copies of this letter to confirm our agreement and return them to me.

Very truly yours,

Kevin Costner

AGREED

Peggy Detmers

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

PEGGY A. DETMERS,	)	File No. 40CIV22-17
	)	
Plaintiff,	)	
	)	**DEFENDANT'S ANSWERS AND RESPONSES TO PLAINTIFF'S INTERROGATORIES, REQUESTS FOR PRODUCTION AND REQUESTS FOR ADMISSIONS**
v.	)	
	)	
KEVIN COSTNER,	)	
	)	
Defendant.	)	

COMES NOW Defendant Kevin Costner and hereby submits his answers and responses to Plaintiff's Interrogatories, Requests for Production of Documents and Requests for Admissions to Plaintiff:

OBJECTIONS

All the responses to requests for production of documents provided below and to be served by Defendant and his representatives, are made subject to and notwithstanding the below "Objections of General Application." The "Objections of General Application" apply to each and every request set forth in Plaintiff's Discovery Demands and will not be repeated separately herein and/or repeated separately when Defendant responds further to Plaintiff's Discovery Demands in the future.

Objections of General Application

A. Defendant objects to each and every one of Plaintiff's Discovery Demands to the extent that they purport to seek responses from Defendant's counsel of record, who are not parties to this matter; seek attorney-work product; or seek information which is privileged and therefore not subject to discovery.

B. Defendant objects to any and all instructions or definitions beyond the requirements imposed by the Rules of Civil Procedure.

Exhibit C

Service Document

C. Defendant objects to each request to the extent it is unreasonably cumulative or duplicative, or the information sought by the request is obtainable from some other source that is more convenient, less burdensome, or less expensive.

D. Defendant objects to Plaintiff's Discovery Demands to the extent they require Defendant to identify documents or describe information not presently within Defendant's possession, custody, or control.

E. Defendant objects to any and all of Plaintiff's Discovery Demands that seek disclosure of confidential, proprietary, or other protected information, in the absence of a confidentiality or protective order.

F. Defendant responds to Plaintiff's Discovery Demands solely for the purposes of this action. Each response is subject to all objections as to competence, relevance, materiality, propriety and admissibility, and any and all other objections and grounds which would require the exclusion of any statement or document herein if the interrogatory or request was asked of, or any statement contained herein was made by, a witness present and testifying in Court, or if the document or statement contained therein was offered at trial, all of which objections and grounds are reserved and may be interposed at the time of trial.

G. Defendant has responded and/or will respond to each of Plaintiff's Discovery Demands based on the Defendant's own understanding of those interrogatories and/or discovery requests and to the best of Defendant's knowledge, recollection, and understanding at the date the response was served. Defendant has not concluded their investigation of the facts related to this case, formal discovery, or preparation for trial and Defendant accordingly and expressly reserves the right to amend or supplement these responses by means of further responses, production, or pre-trial filings required or permitted by the Rules of Civil Procedure.

Service Document

H. Defendant does not waive any general or particular objection in the event documents produced come within the scope of any such objections.

INTERROGATORIES

1. Name the individual(s) who provided or assisted with providing information in response to these Interrogatories.

ANSWER: Francis Shelley, Accountant for Kevin Costner.

2. Name the individual(s), entity, or entities that has/have any ownership interest in the approximate 35.11 acres located at 100 Tatanka Drive.

ANSWER: Deadwood Land Holdings, LLC, a single member LLC owned by The Dunbar, Inc, which is owned 100% by Kevin Costner and Black Hills Conference Center, Inc-98.5% owned by Kevin Costner.

3. Name the individual(s), entity, or entities that have/had any ownership interest in and/or were responsible for managing the operations of the business known as "Tatanka" ("the business") located at 100 Tatanka Drive when it was last open to the public.

ANSWER: Ownership info provided in item #2. Manager is Susan Caldwell.

4. Name the individuals, last known addresses, and telephone numbers of the employees who were employed by the individuals or entities listed in your response to Interrogatory No. 3 above when the business was last open to the public. For each individual, state:

a. Whether the individual is still employed by the individual(s), entity, or entities;
b. If the individual is no longer employed, whether he or she resigned, was terminated, or was laid off;
c. If the individual was laid off or resigned, the reason the individual was laid off or resigned and whether the individual received a severance.

ANSWER: Susan Caldwell, manager, (605) 580-1119
Sylvia Trentz.

5. If your response to Interrogatory No. 4(c) above is that the individual(s) employment is seasonal or limited to seasons in which the business is open to the public, state the names of the individuals who have been invited to return to work when the business is re-opened to the public.

ANSWER: Additional info forthcoming from Susan Caldwell.

Service Document

6. Name the individual(s), entity, or entities that have any ownership interest in the 17 piece bronze Buffalo Jump Monument ("the sculptures") located on the approximate 35.11 acres at 100 Tatanka Drive.

ANSWER: The Dunbar, Inc.

7. List the name of any real estate agent or broker and the business he or she owns or is employed by that has been retained by you or any individual or entity acting upon your behalf to list the property at 100 Tatanka Drive for sale during the last 12 months.

ANSWER: Mike Percevich, The Real Estate Center of Lead-Deadwood.

8. List the names of any individuals and the entities for whom they are employed by and/or affiliated with that you or anyone acting upon your behalf had discussions with related to the removal and/or relocation of the sculptures. For every discussion, state:

a. Approximately when the discussion occurred;
b. Whether the discussion was in person, over the phone, or via written communications;
c. The nature of the discussion.

ANSWER: Defendant is gathering this information and will supplement this discovery response.

9. Other than the sculptures, has any of the personal property, including but not limited to, furniture, appliances, electronics, memorabilia, costumes or other goods that were used in connection with the business when it was last open to the public been removed, sold or otherwise been disposed of?

ANSWER: Nothing recently in the past year or two has been removed from Tatanka

10. If your answer to Interrogatory No. 9 above is "yes," list the personal property that was removed, sold, or otherwise disposed of and identify what additional personal property you or someone acting on your behalf intend to remove and when you or someone acting on your behalf intend to remove it.

ANSWER: N/A

11. If your answer to Interrogatory No. 9 was "no," please list the personal property you intend to remove, sell, or otherwise dispose of in the event the 100 Tatanka drive property sells.

ANSWER: All property at Tatanka will be removed when it is sold, some may go to storage.

Service Document

12. Does your website currently allow customers to book visits to the 100 Tatanka Drive property for next season?

ANSWER: Yes, website allows bookings for Spring/Summer 2022.

13. If your answer to Interrogatory No. 12 above was "no," please state why your website is not allowing customers to book visits for next season.

ANSWER: N/A

14. State the factual basis for your affirmative defense that Plaintiff's claims are barred by the applicable statute of limitations.

ANSWER: The statute of limitations for breach of contract is 6 years, *see* Supreme Court decision in this case attached to Plaintiff's Complaint at Exhibit C.

15. State the factual basis for your affirmative defense that Plaintiff's claims are barred by the doctrine of *res judicata* and collateral estoppel.

ANSWER: *See* Supreme Court decision in this case attached to Plaintiff's Complaint at Exhibit C.

16. State the factual basis for your affirmative defense that Plaintiff did not appropriately mitigate her damages.

ANSWER: *See* Answer to Interrogatory 15 and Plaintiff's failure to recognize or follow the parties' agreement attached to Plaintiff's Complaint at Exhibit A.

17. Provide the name of all witnesses you intend to call at trial, including any expert witnesses.

ANSWER: All trial witnesses and expert witnesses will be disclosed consistent with the Court's scheduling order and within a reasonable time prior to trial.

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. All written correspondence or communications, tangible or in electronic form, between you and/or anyone acting upon your behalf and any real estate agent or broker you and/or anyone acting on your behalf retained to sell the approximate 35.11 acres located at 100 Tatanka Drive.

RESPONSE: Communication between Tim Hoctor, acting on behalf of Kevin Costner, and the real estate agent, Mike Percevich, were mostly done by telephone. Any written communication in tangible and electronic form will be supplemented.

2. Copies of all contracts between you, anyone acting on your behalf, and/or any entity in which you have an ownership interest and any real estate agent or broker you retained to sell the 35.11 acres located at 100 Tatanka Drive.

RESPONSE: I have requested a copy of the contract from the real estate agent.

3. All written correspondence or communications, tangible or in electronic form, between you and/or anyone acting on your behalf related to any personal property used in connection with the business that was being operated at 101 Tatanka Drive while it was open to the public that has subsequently been removed, sold, or otherwise disposed of.

RESPONSE: N/A

4. All written correspondence or communications, tangible or in electronic form, between you and/or anyone acting on your behalf related to your intent that personal property used in connection with the business being operated at 101 Tatanka Drive while it was open to the public be removed, sold, or otherwise disposed of.

RESPONSE: N/A

5. All documents, including but not limited to written correspondence and communications, in tangible or in electronic form, between you or someone acting on your behalf, and any other individual that relates in any way to your intent to remove and/or relocate the 17 piece bronze Buffalo Jump Monument ("the sculptures").

RESPONSE: This discovery response will be supplemented when the information is obtained.

6. All documents, including but not limited to written correspondence, in tangible or electronic form, authored by you, someone acting upon your behalf, or someone acting upon the behalf of an entity of which you have an ownership interest in, that relate to a decision to permanently close or an intent to permanently close the business that had been operated at 100 Tatanka Drive.

RESPONSE: This discovery response will be supplemented when the information is obtained.

7. All exhibits you intend to offer at trial or in support of a Motion for Summary Judgment.

RESPONSE: All trial exhibits will be provided consistent with the Court's scheduling order and within a reasonable time prior to trial.

8. The CV, resume, and report of any expert witness you intend to call at trial.

RESPONSE: All expert disclosures will be made consistent with the Court's scheduling order.

Service Document

To the extent not already produced, all documents you or someone on your behalf referenced and/or relied upon in answering Plaintiff's First Set of Interrogatories.

REQUESTS FOR ADMISSIONS

1. Admit that you intend to remove and/or relocate the Buffalo Jump Monument ("the sculptures") upon the sale of the approximate 35.11 acres located at 100 Tatanka Drive ("the property").

RESPONSE: Admit, the current intention is to relocate the "Buffalo Jump" sculptures to another location where they will be accessible to the public.

2. Admit that you did not inform the Plaintiff or seek her agreement to remove and/or relocate the sculptures prior to listing the property for sale.

RESPONSE: Admit, did not inform Peggy of intent to relocate the sculptures prior to listing the property for sale.

3. Admit that neither you nor the entity in which you have ownership interest in that controls the business known as "Tatanka" located on the property intends to continue operating that business in the future.

RESPONSE: Admit, current plan is for Tatanka to continue operating until the property sells.

4. Admit that the property is not and will not be open to the public while the property is listed for sale.

RESPONSE: Tatanka will continue to operate and remain open to the public while it is listed for sale.

5. Admit that other than the property listed for sale, that you, someone acting on your behalf or an entity in which you have/had an ownership interest in has sold all the other real estate that was intended to be the location of the Dunbar Resort.

RESPONSE: The surrounding property of Tatanka that was to be part of the "Dunbar Resort" has been sold.

6. Admit that you intend to relocate the sculptures to Arkansas.

RESPONSE: Admit that there have been discussions to move the sculptures to Hot Springs, Arkansas.

7. Admit that Arkansas is not and has never been a region of the Great Sioux Nation.

RESPONSE: To our knowledge, Arkansas is not a region of the Great Sioux Nation.

Service Document

8. Admit that there are no Sioux Indian Reservations in Arkansas.

RESPONSE: To our knowledge, there are no Sioux Indian Reservations in Arkansas.

9. Admit that the sculptures depict three Lakota Sioux Indian Warriors hunting buffalo.

RESPONSE: The "Buffalo Jump" sculptures depict three Lakota Sioux Indian Warriors hunting buffalo.

10. Admit that when the business known as "Tatanka" was operating and open to the public, that it included a Northern Plains Peoples Educational Interpretive Center.

RESPONSE: Tatanka is open to the public and includes a Northern Plains Peoples Educational Interpretive Center.

11. Admit that when the business known as "Tatanka" was operating and open to the public, that it employed Lakota Sioux individuals that educated visitors about the Lakota Sioux culture.

RESPONSE: Tatanka has in the past employed Lakota Sioux individuals that educated visitors about the Lakota Sioux culture.

Service Document

Dated this 11 day of ~~April~~ MAY 2022.

FRANCIS SHELLEY

Francis Shelley

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

On this ______ day of ~~April~~, 2022, before me, the undersigned officer, personally appeared Francis Shelley, known to me ~~or~~ satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purpose therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

____
Notary Public – California
My Commission Expires: ____________

(SEAL)

Service Document

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California

County of Los Angeles

On May 11, 2022, before me, Rod Elyson, Notary Public, personally appeared

Francis Shelley,

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature [signature]

ROD ELYSON
COMM. #2331614
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My Comm. Expires Sep. 7, 2024

OPTIONAL

The description below is not required by law but may be valuable to persons relying on the attached document and could prevent fraudulent use of this form.

Title or Description of Attached Document:

Defendants Answers ---

Document Date: —— Number of Pages: 9

Service Document

AS TO OBJECTIONS:

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

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CERTIFICATE OF SERVICE

I, Marty J. Jackley, hereby certify that on the 12th day of May, 2022, a true and correct copy of the foregoing was served through the Odyssey File and Serve System upon:

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By: /s/ Marty J. Jackley
Marty J. Jackley

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

PEGGY A. DETMERS,	)	FILE NO. 40CIV22-17
	)	
Plaintiff,	)	
	)	**DEFENDANT'S PROPOSED MEMORANDUM DECISION AND ORDER**
v.	)	
	)	
KEVIN COSTNER,	)	
	)	
Defendant.	)	

This matter comes before this Court on the parties' cross-motions for summary judgment. A hearing was held at the Lawrence County Courthouse on July 22, 2022, at 10:30 a.m. where the Plaintiff, Peggy Detmers (Detmers), was personally present and was represented by her attorneys, Andrew Damgaard and A. Russell Janklow. The Defendant, Kevin Costner (Costner), was represented by his attorneys Catherine A. Seeley and Marty J. Jackley. The Court, having reviewed the parties' briefs and having heard the arguments of counsel, issues the following Memorandum Decision and Order.

FACTUAL BACKGROUND

The material facts relating to Costner's Motion for Summary Judgment are not in dispute. The pertinent issues were litigated, decided, and affirmed by courts of competent jurisdiction more than ten years ago. This Court will not permit the parties to relitigate matters previously decided in the prior action. *Wells v. Wells*, 2005 S.D. 67, ¶ 15, 698 N.W.2d 504, 508.

In the early 1990s Costner sought to build a five-start resort on real property he owned near Deadwood, South Dakota, to be called The Dunbar. He commissioned Detmers to create a set of sculptures to be displayed at the resort. When The Dunbar had not been built by the late 1990s, Costner and Detmers negotiated and entered into a written contract for the completion of

the sculptures regardless of whether The Dunbar would be built. The contract dated May 5, 2000, consisted of five paragraphs and outlined the parties' varying interests in the sculptures and their reproductions.

Relevant to this matter are the second, third, and fourth paragraphs of the contract.[1] The second paragraph provides that Costner "will be the sole owner of all rights in the sculptures, including the copyright," and provides Detmers with a continuing interest the sales of reproductions of the sculptures in that she "will always be attached through [her] royalty participation." The third paragraph addresses what may happen in the event The Dunbar is never built. Paragraph three provides in full:

> Although I [(Costner)] do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere, I will give you [(Detmers)] 50% of the profits from the sale of the one and one-quarter life scale sculptures after I have recouped all my costs incurred in the creation of the sculptures and any such sale. The sale price will be at our (sic) above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders).

Paragraph four of the contract further addresses the display of the sculptures and provides:

> We will locate a suitable site for displaying the sculptures if The Dunbar is not under construction within three (3) years after the last sculpture has been delivered to the mold makers. In the meantime, until the sculptures are put on display, I will permit you to market and sell reproductions and you can retain eighty percent 80% of the gross retail sales price and pay 20% to me. Once the sculptures are put on public display in public view, agreed upon by both parties (but with the final decision to be made by me if we do not agree); the percentages will reverse, 80% of the gross retail sales price to me and 20% to you. The marketing must proceed as outlined below.

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[1] The first paragraph of the parties' contract provides that Detmers shall receive additional compensation for her work; that paragraph is not at issue in the current litigation. Paragraph five of the contract sets forth certain marketing obligations; similarly, that paragraph is not at issue in the current litigation.

The Dunbar had not been built, nor was it under construction, by the early 2000s. In order to comply with the contract, Costner located an alternative site on land intended to be part of The Dunbar at which to display the sculptures. Costner proposed the location to Detmers who agreed to the display and assisted with the placement of the sculptures at the site. To accompany the display and to enhance visitors' experiences, Costner erected several amenities at the site, including a visitor center, gift shop, café, interactive museum, and nature walkways. The display along with the other amenities came to be known as Tatanka.

PRIOR LITIGATION

In 2008, Detmers initiated suit against Costner claiming that he breached their May 5, 2000 contract because The Dunbar had not been built and asserting that Detmers did not agree to the placement of the sculptures at Tatanka. The litigation focused primarily on paragraph three of the parties' May 5, 2000 contract.

Despite paragraph three of the May 5, 2000 contract, which indicated that the sculptures could be agreeably displayed elsewhere if The Dunbar was not built within ten years, Detmers's verified complaint dated December 9, 2008, unequivocally stated "Detmers has not agreed and *will not agree* to an alternative permanent location for the monument." *See* Verified Complaint and Demand for Jury Trial, ¶ 27, originally filed in Pennington County file Civ. 08-2354 (emphasis added).

Throughout the course of that litigation, Detmers advanced two arguments. First, she argued that she did not agree to display the sculptures at Tatanka past 2010 if The Dunbar had not been built. *See* Plaintiff's Proposed Findings of Fact and Conclusions of Law, ¶ 39, filed in Lawrence County Civ. 09-60. Second, she argued that Tatanka did not constitute "elsewhere" under the terms of the May 5, 2000 contract because Tatanka was located on a portion of real property originally intended as part of The Dunbar. *See Detmers v. Costner*, 2012 S.D. 35, ¶ 17,

814 N.W.2d 146, 150. In response to Detmers's assertion that her consent to the sculptures' placement at Tatanka was temporary and contingent, Costner argued that Detmers agreed to place the sculptures at Tatanka for the long term, or permanently, thereby satisfying paragraph three of the parties' May 5, 2000 contract. *See* Defendant's Proposed Findings of Fact and Conclusions of Law, ¶ 55, filed in Lawrence County Civ. 09-60.

The circuit court determined that the contract was unambiguous and after a bench trial, concluded that Detmers "was agreeable to the sculptures' placement at Tatanka for the long term," and that "Costner has fully performed under the terms of the contract." *See* Trial Court's Findings of Fact and Conclusions of Law, ¶¶ 14-15, filed in Lawrence County file Civ. 09-60. Ultimately the circuit court entered a final judgment in favor of Costner, which the South Dakota Supreme Court affirmed. *Detmers*, 2012 S.D. 35, 814 N.W.2d 146.

POST APPEAL FACTUAL BACKGROUND

Since the South Dakota Supreme Court's decision in the prior action, the sculptures have remained displayed at Tatanka. Recently, a real estate listing was posted for the land upon which Tatanka sits. The real estate listing states, "Tatanka statues are not included- will be relocated by seller." After becoming aware of that listing, Detmers again brought suit against Costner alleging breach of contract under a theory of anticipatory repudiation and alternatively seeking a declaratory judgment. *See* Complaint.

DISCUSSION

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SDCL 15-6-56(c). The moving party must demonstrate the lack of a genuine issue of material fact and show entitlement to judgment as a matter of law. *Brevet Int'l, Inc. v.*

Great Plains Luggage Co., 2000 S.D. 5, ¶12, 604 N.W.2d 268, 271 (quotation omitted). "The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however must present specific facts showing that a genuine, material issue for trial exists." *Millard v. City of Sioux Falls*, 1999 S.D. 18, ¶ 8, 589 N.W.2d 217, 218 (quoting *Walther v. KPKA Meadowlands Ltd. Partnership*, 1998 S.D. 78, ¶ 14, 581 N.W.2d 527, 531).

Res Judicata

As an initial matter, prior to reaching the merits, Costner argues that Detmers's suit is precluded under the theory of res judicata because the earlier court case concluded that Costner had fully performed under the terms of the contract. "The doctrine of res judicata is premised on two maxims: A person should not be twice vexed for the same cause and it is for the public good that there be an end to litigations." *People ex rel. L.S.*, 2006 S.D. 76, ¶ 23, 721 N.W.2d 83, 90 (cleaned up and citation omitted). Four elements must be present to invoke the preclusive effect of res judicata: "(1) a final judgment on the merits in an earlier action; (2) the question decided in the former action is the same as the one decided in the present action; (3) the parties are the same; and (4) there was a full and fair opportunity to litigate the issues in the prior proceeding." *People ex rel L.S.*, 2006 S.D. 76, ¶ 22, 721 N.W.2d 83, 89-90 (citation omitted). "In examining whether these elements are present, a court should construe the doctrine liberally, unrestricted by technicalities." *Id.*

It is evident that the parties have litigated these issues before. The parties previously asked the circuit court and ultimately the South Dakota Supreme Court to interpret their respective obligations under the May 5, 2000 contract as it related to the placement of the sculptures. The prior case (1) resulted on a final judgment on the merits; (2) decided whether the parties had fully performed under paragraph three of the contract; (3) involved the same parties

to the current case; and (4) provided a full and fair opportunity to litigate the terms of the contract and their respective responsibilities thereunder. As the circuit court held in the prior action, Costner has fully performed under paragraph three of the May 5, 2000 contract by having placed the sculptures at Tatanka for an indefinite time.

Detmers attempts to undermine the prior court's holding by drawing on its, and the South Dakota Supreme Court's, use of the word "permanent." While the word "permanent" was used to describe the sculptures' placement at Tatanka by both Costner and the South Dakota Supreme Court in the prior action, this Court finds that "permanent" does not mean eternal or perpetual as urged by Detmers. It is apparent that the use of the word "permanent" or "final" in the prior proceeding was used to renounce Detmers's contention that the sculptures' placement at Tatanka was only intended to be temporary. "Permanent" is defined by Merriam-Webster as "continuing or enduring without fundamental or marked change," and by Merriam-Webster Kids as "lasting or meant to last for a long time: not temporary." PERMANENT, Merriam-Webster, available at https://www.merriam-webster.com/dictionary/permanent (last accessed August 11, 2022).[2] Applying this ordinary meaning of the word "permanent," the courts in the prior action found that when the parties agreed to place the sculptures at Tatanka, they agreed that the sculptures would continue there without fundamental change for a long time.[3] As the courts previously

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[2] This Court notes that "permanent" cannot be equated with eternal or perpetual as Detmers seems to imply. *See* ETERNAL, Merriam-Webster, available at https://www.merriam-webster.com/dictionary/eternal (last accessed August 11, 2022) (defining eternal as "having infinite duration…lasting forever: having no beginning and no end"); PERPETUAL, Merriam-Webster, available at https://www.merriam-webster.com/dictionary/perpetual (defining perpetual as "continuing forever").

[3] In addition to the ordinary meaning of "permanent," when the term is used in legal jargon, it rarely, if ever, means a situation that is not subject to change. *See e.g.* PERMANENT ALIMONY, Black's Law Dictionary (11th ed. 2019); PERMANENT EMPLOYMENT, Black's Law Dictionary (11th ed. 2019); PERMANENT DISABILITY, Black's Law Dictionary (11th ed. 2019).

determined, Costner has fully performed his display obligation under paragraph three of the May 5, 2000 contract. Accordingly, Costner has satisfied his obligation under that paragraph, no continuing duty thereunder exists, and he is entitled to summary judgment.

Contract Interpretation

Even if the issues in the prior proceeding were not the same as those presented in the current action, Costner's Motion for Summary Judgment is still granted based upon an interpretation of the May 5, 2000 contract's plain language. As the South Dakota Supreme Court pointed out in the prior proceedings, "Contract interpretation is a question of law," and "[w]hen interpreting a contract, [a court] looks to the language that the parties used in the contract to determine their intention." *Detmers*, 2012 S.D. 35, ¶ 20, 814 N.W.2d 146, 151 (cleaned up and citations omitted). "When the words of a contract are clear and explicit and lead to no absurd consequences, the search for the parties' common intent is at an end." *Id.* (quotation omitted). Courts "may neither rewrite the parties' contract nor add to its language." *Id.* (quoting *Culhane v. W. Nat'l Mut. Ins. Co.*, 2005 S.D. 97, ¶ 27, 704 N.W.2d 287, 297.

In addition to reviewing the plain language of a contract provision, "[a] contract is to be examined as a whole and all provisions read together to construe the contract's meaning." *City of Watertown v. Dakota, Minnesota & Eastern R. Co.*, 1996 S.D. 82, ¶ 18, 551 N.W.2d 571, 575; *Friesz ex re. Friesz v. Farm & City Ins. Co.*, 2000 S.D. 152, ¶10, 619 N.W.2d 677, 680 ("A contract is to be examined and read in its entirety with all provisions being read together to construe its meaning."). When one paragraph of a contract does not provide sufficient context on an issue, it is appropriate to look to other paragraphs within a contract to give meaning to terms. *See Kimball Investment Land, Ltd. v. Chmela*, 2000 S.D. 6, 604 N.W.2d 289 (2000) (looking to different paragraphs in a contract to understand time frames discussed in other paragraphs of the same contract).

The parties' May 5, 2000 contract contains only five short paragraphs. The parties' intent and obligations can be ascertained by looking to the language used in those paragraphs. Some provisions in the contract carry continuing obligations while others have contingent or dischargeable duties.

Paragraph three of the parties' contract provides both a dischargeable duty on Costner's part and a contingent provision if he does not meet that duty. The paragraph states in part "if The Dunbar is not built within ten (10) years *or the sculptures are not agreeably displayed elsewhere,* I will give you 50% of the profits from the sale of the one and one-quarter life scale sculptures... [and] I will assign back to you the copyright of the sculptures." Only if both (1) The Dunbar is not built and (2) the sculptures are not agreeably displayed elsewhere within ten years after the May 5, 2022 contract would the sale language of the contract have any possible effect.[4] As the lower court found in the prior litigation, the sculptures had been agreeably displayed elsewhere at Tatanka within that ten year time frame, and they have remained there for many years since. Accordingly, Costner affirmatively satisfied his duty under paragraph three, and the contingent obligation was discharged.

The language of the contract does not indicate that the parties understood or intended the "agreeably displayed elsewhere" language to constitute a continuing right or obligation. In fact, when reading the contract as a whole, the provisions surrounding paragraph three suggest the limited nature of Detmers's input on the sculptures' display. Paragraph two of the May 5, 2000

[4] The context of the provision suggests that a proper reading of the paragraph requires that the sculptures either be placed at The Dunbar or be agreeably displayed elsewhere within ten years of the parties' execution of the contract. *See Argus Leader Media v. Hogstad*, 2017 S.D. 57, ¶¶ 8-9, 902 N.W.2d 778, 781-82 (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 146 (2012)) (discussing the contextual nature of modifying clauses).

contract evidences that the parties knew how to provide for continuing rights and responsibilities. It provides that Costner is "the sole owner of all rights in the sculptures, including the copyright," and that Detmers would "always be attached through [her] royalty participation." Had the parties intended for Detmers to be able to have input on the placement of the sculptures in perpetuity, they could have drafted the language accordingly. They did not.[5]

The language used by the parties evidences their clear intent that once the sculptures are agreeably displayed elsewhere, Costner's obligations under paragraph three of the May 5, 2000 contract were satisfied and he was relieved from any further performance under that obligation. As this Court and the prior court find Costner has fully performed under that provision, there exists no basis for Detmers's current action, and Costner is entitled to summary judgment.

Anticipatory Repudiation

While Detmers maintains that Costner committed an anticipatory repudiation of the May 5, 2000 contract by publishing a real estate listing which indicated the "Tatanka statues...will be relocated by seller," her assertions are unpersuasive for two reasons: (1) the real estate listing does not unequivocally indicate a breach; and (2) Detmers constructively breached her obligations under the contract first, thereby releasing Costner from his obligations under the same. Even if this Court were to deny Costner's Motion for Summary Judgment, Detmers is not entitled to summary judgment as a matter of law because there are disputed facts material to her claim.[6]

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[5] Paragraph four of the parties' May 5, 2000 contract further provides that Costner has greater authority relating to the placement of the sculptures, in that "the final decision [relating to the sculptures' placement is] to be made by [Costner] if [the parties] do not agree." When reading the contract as a whole, paragraph four evidences the parties' intent that Costner have greater decision-making authority when placing the sculptures.

[6] Detmers's current cause of action implies that Costner cannot remove the sculptures from Tatanka based on the parties' prior agreement to place them at Tatanka. However, paragraph

A repudiation of a contract occurs when a party unequivocally indicates that it will not perform its obligations when performance is due. *Union Pac. R.R. v. Certain Underwriters at Lloyd's London*, 2009 S.D. 70, ¶ 39, 771 N.W.2d 611, 621-22. While the real estate listing published by a third party may seem to indicate that the sculptures will be relocated by the seller if the real property is sold, Detmers has not proven that such relocation would be a *breach* of the parties' contract. Even if the contract is interpreted consistent with Detmers's position, Costner and Detmers could agree to an alternate location for the sculptures. Without any proof that Costner will relocate the sculptures to a disagreeable location, the real estate listing published by a third party cannot be an *unequivocal* indication that a breach is imminent.

As indicated above, for purposes of Detmers's Motion for Summary Judgment, "[t]he evidence must be viewed most favorably to [Costner] and reasonable doubts should be resolved against [Detmers]." *Millard*, 1999 S.D. 18, ¶ 8, 589 N.W.2d at 218. Here, and especially considering the evidence in a light most favorable to Costner, Detmers has failed to overcome her burden to establish that Costner has unequivocally refused to fulfill his obligations within the contract. Thus, Detmers's Motion for Summary Judgment must be denied even if Costner's Motion was not granted.

Furthermore, even if this Court had not found, as it did, that Costner already satisfied paragraph three of the parties' contract as discussed above, Costner is relieved from any further performance which may exist under that paragraph because Detmers has committed an anticipatory repudiation of that provision herself. A fair reading of paragraph three would

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three of the parties' May 5, 2000 contract does not require the sculptures to be placed at a particular location as Detmers maintains. To the extent Detmers maintains that the secondary implied agreement to place the sculptures at Tatanka gives rise to her current cause of action, significant issues of material fact exist relating to that supposed agreement, particularly as to whether she may even seek the relief she requests.

indicate that the parties would in good faith seek an agreeable display of the sculptures if The Dunbar did not come to fruition within ten years. *See Table Steaks v. First Premier Bank, N.A.* 2002 S.D. 105, ¶ 16, 650 N.W.2d 829, 834 ("The general rule is that every contract contains an implied covenant of good faith and fair dealing.") (citation omitted). In her Verified Complaint dated December 9, 2008, Detmers asserted that she "has not agreed and *will not agree to an alternative permanent location for the monument.*" *See* Verified Complaint and Demand for Jury Trial, ¶ 27, originally filed in Pennington County file Civ. 08-2354 (emphasis added).

As Detmers herself argues, when an anticipatory repudiation based on a party's unequivocal indication that she will not perform or will refuse to perform when performance is due, may be treated as an immediate breach. *Union Pac. R.R.*, 2009 S.D. 70, ¶ 39, 771 N.W.2d 611, 621-22. Where the repudiation is in writing, and where the terms are unambiguous, a court may resolve the issue of repudiation as a matter of law. *DiFolco v. MSNBC Cable, LLC*, 622 F.3d 104, 112 (2d Cir. 2010). Detmers's December 9, 2008 Verified Complaint is a notarized writing that affirmatively, unequivocally states that she will refuse to perform her good faith obligation to consider an alternative agreeable display location for the sculptures. Accordingly, she herself anticipatorily repudiated her obligation under paragraph three of the parties' contract and Costner should be relieved from any obligations he had thereunder as well. *See Byre v. City of Chamberlain*, 362 N.W.2d 69, 75 (S.D. 1985) (finding that when a garbage collector committed an anticipatory repudiation of his agreement with the city, that the city was free to contract with others for the services he indicated he would not perform).

__Declaratory Judgment__

"Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." SDCL 21-

24-1. "A matter is sufficiently ripe [for a declaratory judgment] if the facts indicate imminent conflict." *Boever v. South Dakota Bd. Of Accountancy*, 526 N.W.2d 747, 750 (S.D. 1995).

A review of the contract language, as discussed above, reveals that Detmers has no continuing rights in the placement or display of the sculptures at issue. Costner fully performed his contractual obligation under paragraph three of the parties' May 5, 2000 contract and no duties thereunder remain outstanding. As Costner owes Detmers no continuing duty under paragraph three of that contract, the declaratory judgment that Detmers seeks leads only to the conclusion that she has no continuing rights relating to the placement of the sculptures.

For the reasons stated herein, it is hereby

ORDERED that Defendant's Motion for Summary Judgment is granted; it is further

ORDERED that Plaintiff's Motion for Summary Judgment as to her claim for anticipatory repudiation is denied; and it is further

ORDERED that Plaintiff's Motion for Summary Judgment as to her claim for declaratory judgment is granted, in that Detmers has no continuing contractual rights or interest in the placement of the sculptures at issue.

BY THE COURT:

____

Honorable Eric Strawn
Circuit Court Judge

CERTIFICATE OF SERVICE

I hereby certify on August 12, 2022, a true and correct copy of **DEFENDANT'S PROPOSED MEMORANDUM DECISION AND ORDER** was electronically filed through South Dakota's Odyssey File and Serve Portal, and served upon the following:

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Catherine A. Seeley

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

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PEGGY A. DETMERS,	:	40CIV. 21 -
Plaintiff,	:	
v.	:	**COMPLAINT**
KEVIN COSTNER,	:	40CIV22-000017
Defendant.	:	

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

The Plaintiff, Peggy Detmers ("Detmers") states and alleges the following in support of her Complaint:

1. Detmers is a resident of Pennington County, South Dakota.

2. The Defendant, Kevin Costner ("Costner") is a resident of California.

3. Detmers is an artist known for her production of wildlife sculptures.

4. In the early 1990's, Costner desired to build a five-star international resort and casino in Deadwood, South Dakota.

5. The resort, which was to be named "The Dunbar," was to have 17 buffalo and Lakota bronze sculptures at its entrance.

6. Detmers orally agreed to create the sculptures for Costner.

7. Detmers accepted a significantly reduced fee of $250,000 in exchange for royalty rights in the sculptures' reproductions, which were to be marketed and sold at The Dunbar.

8. Detmers began working on the sculptures in the spring of 1994.

9. When The Dunbar had not been built by the late 1990's, however, Detmers stopped working on the sculptures.

10. After several months of discussions between them, he and Detmers entered into a contract.

11. The contract is dated May 5, 2000. It provides that Detmers would receive an additional $60,000 in compensation and royalty rights on reproductions in exchange for her completing the 17 sculptures. A copy of the contract is attached hereto and incorporated herein as Exhibit A.

12. With respect to royalty rights on reproductions of the sculptures, the contract contemplated the sculptures as a "valuable asset." (*Id.* at ¶ 2).

13. The contract also contemplated that the sculptures would be publically displayed. (*Id.* at ¶ 4).

14. The contract gave Detmers certain rights related to the display of the sculptures.

15. Paragraph 3 of the contract provides:

> Although I [Costner] do not anticipate this will ever arise, if The Dunbar is not built within (10) years or the sculptures are not agreeably displayed elsewhere, I will give you [Detmers] 50% of the profits from the sale of the one and one-quarter life scale sculptures after I [Costner] have recouped all my costs incurred in the creation of the sculptures and any such sale. The sale price will be at or above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you [Detmers] the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders). (Exhibit A, ¶ 3).

16. Detmers finished the sculptures in June of 2000, which was just over six years after she commenced her work.

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17. Each of the 17 sculptures weighs approximately 2,000 pounds and collectively the 17 pieces are the third-largest bronze sculpture in the world.

18. By January of 2002, The Dunbar still had not been built.

19. The sculptures were displayed on the property where Costner intended to build The Dunbar.

20. The display was called "Tatanka."

21. Tatanka is open to the public and includes a visitor center, gift shop, café, interactive museum, and nature walkways.

22. Although Costner claimed he still intended to build The Dunbar on the same property where Tatanka was located, by 2008 The Dunbar had not been built.

23. Detmers brought an action against Costner in 2008 alleging she did not agree to the placement of the sculptures in the absence of The Dunbar and, as a result, the sculptures had not been agreeably displayed "elsewhere" as required by paragraph 3 of the contract.

24. The trial court ruled for Costner, holding that Tatanka was "elsewhere" pursuant to paragraph 3 of the contract. A copy of the trial court's Findings of Fact and Conclusions of Law are attached and incorporated herein as Exhibit B.

25. The trial court specifically found that Detmers was "agreeable to the sculptures' placement at Tatanka for the long term." *Id.* at p. 9, § 13.

26. The trial court also found that Costner intended to build The Dunbar.

27. On appeal, the South Dakota Supreme Court held that the issue before it was a factual issue and that the trial court's finding that Detmers and Costner agreed to the "*permanent* display of the sculptures at Tatanka" was not clearly erroneous. *Detmers v. Costner*, 814 N.W.2d 146, 149 (S.D. 2012) (emphasis added). A copy of the decision is attached as Exhibit C.

28. The Supreme Court held that the contract between Detmers and Costner was binding and unambiguous and that Tatanka satisfied the contractual condition of the sculptures being agreeably displayed "elsewhere." *Id.* at 150.

29. The Supreme Court also affirmed the trial court's findings that Costner intended to build the Dunbar and was continuing to try and build it. *Id.* at 149.

30. As a result, the trial court's decision was affirmed. *Id.*

31. In the years that followed the Court's opinion, Detmers continued to receive a small amount of royalties from goods sold at Tatanka that were sold in connection with her name.

32. The royalties, however, were a very small fraction of the royalties she anticipated receiving from selling miniature reproductions of the sculptures at an international 5-star resort and casino.

33. Although she has the original molds for the 17 sculptures, she cannot reproduce the 17 sculptures because Costner owns the copyright.

34. Costner sold his restaurant and casino in Deadwood.

35. Costner sold all of the land where the resort was to be built with the exception of the 35 acres where Tatanka is located.

36. Costner now has listed those 35 acres for sale, which includes the visitor center, gift shop, café, interactive museum, and nature walkways. A copy of the real estate listing is attached hereto and incorporated herein as Exhibit D.

37. The listing, however, expressly excludes the 17 sculptures Detmers created from the sale and provides that they "will be relocated by seller."

38. Neither Costner nor anyone on his behalf has told Detmers where the sculptures will be relocated or attempted to procure her agreement pursuant to paragraph 3 of the contract to relocate the sculptures somewhere other than Tatanka.

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39. Detmers has not agreed to the sculptures being displayed somewhere other than Tatanka.

FIRST CAUSE OF ACTION--BREACH OF CONTRACT

40. Paragraphs 1 through 39 are incorporated herein as if set forth in full.

41. The Supreme Court's opinion in *Detmers v. Costner*, 814 N.W.2d 146 (S.D. 2012), affirmed the trial court's finding that Detmers and Costner agreed, pursuant to paragraph 3 of their contract, to display the sculptures at Tatanka, which was "elsewhere."

42. By listing the 35 acres upon which Tatanka is located for sale and unequivocally stating that the sculptures are to be relocated, Costner has committed an anticipatory repudiation of that agreement.

43. Detmers is legally entitled to an Order directing Costner to sell the sculptures and transfer the copyright back to Detmers pursuant to paragraph 3 of their contract.

ALTERNATIVE COUNT—DECLARATORY JUDGMENT

44. Paragraphs 1 through 43 are incorporated herein as if set forth in full.

45. As set forth in the South Dakota Supreme Court's decision, the contract between Detmers and Costner gave Detmers rights "regarding display of the sculptures." *Id.* at 148.

46. Detmers and Costner's contractual rights and legal relations are affected by Costner listing Tatanka for sale and unequivocally stating that the sculptures will be relocated.

47. A controversy exists between Detmers and Costner as to whether selling the real estate, closing Tatanka, and/or relocating the sculptures would breach the agreement between Detmers and Costner to display the sculptures at Tatanka, which included a visitor center, gift shop, café, interactive museum, and nature walkways.

48. A declaratory judgment from this Court would remove any uncertainty and terminate the controversy between the parties.

49. Pursuant to South Dakota's Uniform Declaratory Judgment Act, Detmers respectfully requests a declaration from this Court that closing Tatanka or relocating the sculptures would constitute a breach of Detmers and Costner's agreement and trigger the sale of the sculptures and assignment of the copyright back to Detmers as set forth in paragraph 3 of their contract.

WHEREFORE, the Plaintiff, Peggy Detmers, respectfully requests the following relief:

(1) For a judgment against Costner for breaching the agreement and an order requiring Costner to sell the sculptures in a commercially reasonable manner and assign the copyright to the sculptures back to Detmers in accordance with paragraph 3 of their contract;

(2) Alternatively, for a declaration from this Court that closing Tatanka or relocating the sculptures would constitute a breach of the agreement and entitle Detmers to the remedy set forth in paragraph 3 of their contract; and

(3) For allowable costs and disbursements incurred pursuing this action.

Dated this 22nd day of Nov, 2021.

JOHNSON, JANKLOW, ABDALLAH &
REITER, LLP

BY [signature]

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Sioux Falls, SD 57101
(605) 338 -4304
Russ@janklowabdallah.com
Attorneys for the Plaintiff

Dated this 22nd day of Nov, 2021.

WOODS, FULLER, SHULTZ & SMITH, PC

BY /s/ Andrew R. Damgaard

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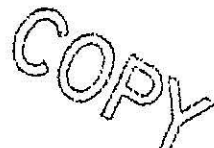
Kevin Costner



May 5, 2000

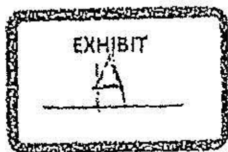
Peggy Detmers
Detmers Studios
13488 Shelter Drive
Rapid City, South Dakota 57702

Dear Peggy,

1. In order to assist you during your transition period to other work, I will pay you $60,000 ($5,000 per month on the first day of each month over the next year) once the last sculpture has been delivered to the mold makers. I will even make $10,000 of this a non-taxable gift to you so that you will only have to pay taxes on $50,000. If we are able to sell the "Ridge Runners" (H&R1, BB1, CW2, and CF3) or the "Collision" (H&R3 and BB13) in the life scale to any party at or above standard bronze market pricing, the $60,000 will have not to be paid. The receipts from any such sale will be divided as outlined in clause 2.

2. Although I will be the sole owner of all rights in the sculptures, including the copyright, in the sculptures, you will always be attached through your royalty participation. Because I believe that the sculptures are a valuable asset, I feel strongly that it is important that you maintain your 20% of gross retail price royalty on future sales of fine art reproductions (5% of gross retail price royalty on mass market reproductions selling for under $200). However, should you desire to sell that interest to me at some point in the future, I would be happy to discuss that with you in good faith.

3. Although I do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere, I will give you 50% of the profits from the sale of the one and one-quarter life scale sculptures after I have recouped all my costs incurred in the creation of the sculptures and any such sale. The sale price will be at our above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders)



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4. We will locate a suitable site for displaying the sculptures if The Dunbar is not under construction within three (3) years after the last sculpture has been delivered to the mold makers. In the meantime, until the sculptures are put on display, I will permit you to market and sell reproductions and you can retain eighty percent 80% of the gross retail sales price and pay 20% to me. Once the sculptures are put on public display in public view, agreed upon by both parties (but with the final decision to be made by me if we do not agree), the percentages will reverse, 80% of the gross retail sales price to me and 20% to you. The marketing must proceed as outlined below.

5. After the sculptures are completed and prior to the resort's completion, I will, upon your request, advance the costs necessary to produce, photograph and advertise up to two (2) maquette limited editions (not to exceed $7,500 in the aggregate), provided that such advances will be recoupable out of sales proceeds and the royalties paid as indicated above. A minimum of two Southwest Art full page, full color ads are to be purchased (not to exceed $5,220 in the aggregate) within this first year (2000), to market one of the editions, it being understood that the amounts paid for such ads will be recoupable out of the sales proceeds.

If the foregoing is acceptable, please sign two (2) copies of this letter to confirm our agreement and return them to me.

Very truly yours,

Kevin Costner

AGREED

Peggy Detmers

APP. 061

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

****

PEGGY DETMERS AND DETMERS STUDIOS, INC.,	)	Civ. 09-60
Plaintiffs,	)	
	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	)	
KEVIN COSTNER AND THE DUNBAR, INC.,	)	
Defendants.	)	

****

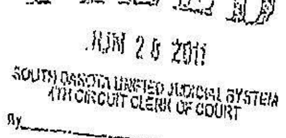
A trial to the Court was held on February 22 and 23, 2011, at the courtroom of the Lawrence County Courthouse, Deadwood. Plaintiffs appeared personally and by counsel, Mr. A. Russell Janklow and Mr. Andrew R. Damgaard, Sioux Falls. Defendants appeared personally and by counsel, Mr. James S. Nelson and Mr. Kyle L. Wiese, Rapid City. The Court having heard the testimony of witnesses and having reviewed the briefs and exhibits, issues the following FINDINGS OF FACT AND CONCLUSIONS OF LAW.

FINDINGS OF FACT:

1. Any Finding of Fact may be deemed to be a Conclusion of Law and any Conclusion of Law may be deemed to be a Finding of Fact.

2. The Court's Memorandum Decision dated 6-28-11, is herein incorporated by this reference.

3. Beginning in the 1990s, Kevin Costner envisioned building a five-star hotel and resort on real property north of



Deadwood. This resort was to be named after one of his movie characters and called The Dunbar.

4. Costner planned to include sculptures of bison at the entryway to the hotel.

5. Costner commissioned artist Peggy Detmers to build the bison sculptures. The final plans for the sculptures called for 14 bison and 3 Lakota warriors mounted on horseback. The sculptures are 25 percent larger than life scale.

6. The parties agreed that Detmers would be paid $250,000 and would receive royalty rights in fine art reproductions of the sculptures that were to be marketed and sold at the gift shop/gallery at The Dunbar hotel.

7. In the late-1990s and the early part of 2000, Detmers stopped working on the sculptures because The Dunbar had not been built. Detmers and Costner negotiated additional compensation to Detmers in exchange for completion of the sculptures and entered into an express written contract on May 5, 2000. The contract provided an additional payment of $60,000 for Detmers (increasing her total compensation for the sculptures to $310,000), royalty rights on reproductions, and display of the sculptures. This contract is at the center of the parties' current dispute, and paragraph 3 provides:

> Although I do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere, I will give you 50% of the profits from the sale of the

> one and one-quarter life scale sculptures after I have recouped all my costs incurred in the creation of the sculptures and any such sale. The sale price will be at our [sic] above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders).

8. Because the resort had not been built in the early 2000s, the parties began looking for alternate locations to display the sculptures pursuant to a display requirement in paragraph 4 of the May 5, 2000 agreement. Detmers considered locations in Hill City, while Costner consider locations in and around Deadwood.

9. Ultimately, Costner realized that he could place the sculptures on a portion of the real property he owned and intended for The Dunbar.

10. Costner called Detmers on January 23 or 24, 2002 to let her know that he was considering placing the sculptures at a site on The Dunbar property. At that location, Costner knew he could dedicate a site for the sculptures and provide them with protection, something that several of the temporary locations he considered could not.

11. Detmers received a phone call from Costner on January 23 or 24, 2002.

12. On January 29, 2002, the project's architect, Patrick Wyss, sent a letter to Costner confirming the beginning of the

design process on this project, which came to be known as Tatanka.

13. Wyss was instructed by Costner to keep Detmers informed and involved. Beginning in June 2002, Detmers was influential in the placement of the sculptures on the Tatanka property.

14. In March 2003, the "mock-up" of the sculpture placement began. Numerous photos were admitted into evidence depicting Detmers' involvement in the "mock-up" and final placement of the sculptures.

15. The Court finds that the use of the "mock-ups" was Detmers' idea. Essentially this entailed placing temporary plywood cut-outs of the sculptures where the final sculptures would ultimately be installed. Using these wood "mock-ups," the design could be easily changed and rearranged before the final sculptures had been delivered for placement. Through the use of the "mock-ups" the exact location of each piece could be pinpointed using GPS technology and staking for final placement of each sculpture.

16. Costner ceded many decisions to Detmers because, as the artist, she "had a place of authority" and "heavy influence" regarding sculpture placement.

17. Numerous media articles from 2002 and 2003 quote Detmers as being "excited" and "relieved" about the sculptures

placement at Tatanka. Those same articles characterize Tatanka as a "stand-alone" entity, completely separate from The Dunbar.

18. Tatanka consists of a visitor's center with a gift shop and café, interactive museum, nature walkways, and the sculptures.

19. Costner spent approximately $6,000,000 building this attraction.

20. Tatanka was dedicated and had its public grand opening on June 21, 2003. Both Costner and Detmers spoke at the grand opening.

21. In December 2008, Detmers brought suit against Costner alleging breach of contract. In her prayer for relief she requested specific performance. She alleges that because The Dunbar was not built within ten years and the sculptures are not agreeably displayed elsewhere she is entitled to 50 percent of the proceeds from the sale of the sculptures.

CONCLUSIONS OF LAW:

1. The Court has jurisdiction over the subject matter and personal jurisdiction over the parties.

2. As this Court has previously ruled, the terms of this contract are clear and unambiguous. Memorandum Decision and Order at 5.(December 17, 2010) ("The contract language is not ambiguous."). Said Memorandum Decision is incorporated herein by this reference.

3. When terms are unambiguous, courts construe contract terms using the plain and ordinary meaning of the words. *Kjerstad Realty, Inc. v. Bootjack Ranch, Inc.*, 2009 SD 93, ¶¶ 10-11, 774 NW2d 797, 800-01; *Prudential Kahler Realtors v. Schmitendorf*, 2003 SD 148, ¶¶ 10-11, 673 NW2d 663, 666 ("[T]his Court will apply the 'plain and ordinary meaning' of the disputed term." (other citations omitted)).

4. "Elsewhere," as used in the contract, clearly means at a site other than The Dunbar. This is in accord with the regular meaning of that term. *See* BLACK'S LAW DICTIONARY 468 (5th ed. 1979) (defining elsewhere as "in another place; in any other place"); WEBSTER'S NEW COLLEGIATE DICTIONARY 404 (9th ed. 1986) (defining elsewhere as "in or to another place").

5. Because The Dunbar has not been built, any site is elsewhere, i.e., somewhere other than The Dunbar. The placement of the sculptures at Tatanka is elsewhere. It is "in another place[,]" separate and distinct, from the non-existent Dunbar hotel and resort.

6. In determining whether Costner and Detmers agreed to the sculptures' placement at Tantanka, the conduct of the parties is controlling. *See Weller v. Spring Creek Resort*, 477 NW2d 839, 841 (SD 1991) (recognizing that the existence of an implied contract is determined by the parties conduct); *see also Huffman v. Shevlin*, 72 NW2d 852, 855 (SD 1955) (considering "all

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the circumstances surrounding the execution of the writing and the subsequent acts of the parties" when determining the parties' intent).

7. Because the issue in this case, whether the sculptures were agreeably displayed elsewhere, requires the Court to determine if the parties made an agreement beyond that which is necessary to create the May 5, 2000 contract, the law of implied contracts is applicable. The Court must determine whether the parties' words, actions, and non-actions constituted a further agreement, i.e. an implied contract, regarding the placement of the sculptures somewhere other than The Dunbar. *See In re Estate of Regennitter*, 1999 SD 26, ¶ 12, 589 NW2d 920, 924 ("We look to the totality of the parties' conduct to learn whether an implied contract can be found." (other citations omitted)); *Weller*, 477 NW2d at 841.

8. The language of the contract contemplates that The Dunbar may not be built. The contract states, "[a]lthough I do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years . . . ." Therefore, the contract acknowledges the fact that The Dunbar may not be built.

9. Testimony from Costner and others associated with The Dunbar and Tatanka projects indicates that although Costner has been attempting to build The Dunbar for years, and continues to

try to build it, he never promised Detmers or anyone else that it would actually be built.

10. Any reliance by Detmers on a promise or guarantee, from Costner or his associates, that The Dunbar would be built is unreasonable. *See Vander Heide v. Boke Ranch, Inc.*, 2007 SD 69, ¶ 30, 736 NW2d 824, 834 (finding that "alleged reliance was not in any way justified" (citing Werner v. Norwest Bank South Dakota N.A., 499 NW2d 138, 141-42 (SD 1993))); *Garrett v. BankWest, Inc.*, 459 NW2d 833, 848 (SD 1990) (rejecting a promissory estoppel claim because the alleged reliance was unreasonable).

11. Detmers actions following the decision to place the sculptures at Tatanka indicate that she agreed to display them at that location. Detmers was notified of the plan to place the sculptures at Tatanka in January 2002, she was involved as part of the construction team, she had significant involvement in the "mock-up" and placement of the sculptures in early 2003, and she gave a speech at the Tatanka grand opening in June 2003. Detmers documented her involvement in this project by use of her own photographer during the construction of Tatanka.

12. Detmers testified that she never told Costner that she disagreed with the placement of the sculptures at Tatanka:

> Q: . . . I asked you, did you ever personally tell Kevin that you did not want the sculptures at Tatanka?
> A: As I never thought it would be a stand-alone thing, so I never --

> Q: You didn't tell him, did you.
> A: I told him - I kept asking him, "Is the Dunbar going to be here?" and he said, "Yes." I go, "Okay."

Tr. Trans. Vol. 1, 95:7-13 (February 22, 2011). Detmers did not directly answer the question posed by Costner's counsel regarding whether she told him that she didn't want the sculptures at Tatanka, but based on the Court's observation of the witness during cross-examination, the Court finds that she did not make any definitive statement to Costner stating that she did not want the sculptures placed at Tatanka. Furthermore, Costner testified as follows on the same issue:

> Q: So at any time then did Peggy ever just tell you flat out, "I object to [Tatanka]. I don't want to do it. I don't agree"?
> A: No.

Tr. Trans. Vol. 2, 343:21-24 (February 23, 2011).

13. Her significant involvement in the Tatanka project and her failure to tell Costner or anyone else that she did not agree with placement at Tatanka indicate that she was agreeable to the sculptures' placement at Tatanka for the long term.

14. Costner's funding and building of Tatanka is further evidence of an agreeable display. It is unreasonable to think that Costner would expend millions of dollars in creating this attraction if the parties did not agree that this would be the final display area for the sculptures. To conclude that this was a unilateral decision by Costner that was not agreed upon by Detmers would cause an absurd result; namely that Costner would

have spent $6,000,000 to place the sculptures at Tatanka and if The Dunbar was not built, the sculptures be moved someplace else that was agreeable to them both or that the sculptures be sold upon Detmars' demand. This Court cannot endorse such an absurd result. *See Nelson v. Schellpfeffer*, 2003 SD 7, ¶ 8, 656 NW2d 740, 743.

15. Costner has fully performed under the terms of the contract. The words, actions, and inactions of both parties indicate an agreement to the display of the sculptures at Tantanka.

16. Detmers has failed to prove that Coster breached the May 5, 2000 contract.

Therefore, it is hereby ORDERED:

That Detmers' prayer for relief is DENIED.

Counsel for Costner shall prepare a Judgment consistent with the Court's Findings of Fact and Conclusions of Law and Memorandum Decision within 14 days.

Dated this 28th day of June, 2011.

FILED
JUN 28 2011
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

BY THE COURT:

Hon. Randall L. Macy
Circuit Court Judge

ATTEST:
Carol Latuseck
Clerk of Courts

Deputy

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a true and correct copy of the FINDINGS OF FACT AND CONCLUSIONS OF LAW in the above entitled matter upon the persons herein next designated all on the date below shown, by depositing a copy thereof in the United States Mail at Deadwood, South Dakota, postage prepaid, in envelopes addressed to said addressees, to-wit:

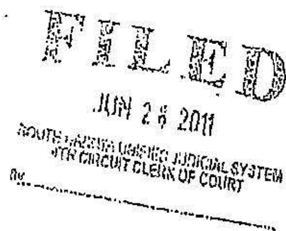
Mr. A. Russell Janklow
Mr. Andrew R. Damgaard
Attorneys at Law
1700 W. Russell Street
Sioux Falls, SD 57104

Mr. James S. Nelson
Mr. Kyle L. Wiese
Attorneys at Law
P.O. Box 8045
Rapid City, SD 57709-8045

which addresses are the last addresses of the addressees known to the subscriber.

Dated this 28th day of June, 2011.

Cindy Gackle
Cindy Gackle
Scheduling Clerk



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814 N.W.2d 146
Supreme Court of South Dakota.

Peggy A. DETMERS and Detmers Studios, Inc., a South Dakota Corporation, Plaintiffs and Appellants,
v.
Kevin COSTNER and The Dunbar, Inc., a South Dakota Corporation, Defendants and Appellees.

No. 26104.
|
Argued March 19, 2012.
|
Decided May 9, 2012.

Synopsis
Background: Sculptor brought action against resort and its developer, seeking a declaratory judgment that she did not agree to placement of sculptures at developer's other project and thus that, under agreement, she was entitled to an order selling the sculptures and part of the proceeds from that sale. The Circuit Court, Fourth Judicial Circuit, Lawrence County, Randall L. Macy, J., entered judgment for developer, and sculptor appealed.

Holdings: The Supreme Court, Gilbertson, C.J., held that:

[1] architect's testimony that there was no understanding that resort where sculptures were to be placed "was ultimately going to be built" was admissible, and

[2] sculptures were "agreeably displayed elsewhere," as required under contract.

Affirmed.

West Headnotes (8)

[1] Appeal and Error ⇐ Clear Error; "Clearly Erroneous" Standard

The Supreme Court will not set aside a trial court's findings of fact unless they are clearly erroneous.

2 Cases that cite this headnote

[2] Appeal and Error ⇐ De novo review

The Supreme Court reviews conclusions of law under a de novo standard, with no deference to the trial court's conclusions of law.

3 Cases that cite this headnote

[3] Declaratory Judgment ⇐ Admissibility

Landscape architect's testimony that there was no understanding that resort where sculptures were to be placed "was ultimately going to be built" was admissible, in sculptor's declaratory judgment action, to establish that developer had never promised sculptor that resort would actually be built, despite deposition testimony where architect had stated that it was his "understanding" that resort was "going to be built" at the time sculptures were placed at developer's other project; deposition testimony concerned whether the plan was still to build the resort at the time the sculptures were finished and placed at developer's other project, and that developer was still working towards building the resort and that placement of sculptures at other project was important to get committed investors.

[4] Specific Performance ⇐ Contracts for construction of buildings or other works

Sculptures originally created for unfinished resort were "agreeably displayed elsewhere," as required under contract, when they were displayed at developer's other project on land originally intended for the resort, such that sculptor was not entitled to specific performance of contract provision requiring the sale of the sculptures and split of proceeds in the event the resort was never built; term "elsewhere" indicated a location other than the resort, which was never built, and other project was

constructed and managed as a separate legal entity from the resort proposal.

[5] Contracts ⇐ Ambiguity in general

Whether the language of a contract is ambiguous is a question of law.

4 Cases that cite this headnote

[6] Appeal and Error ⇐ Construction, interpretation, and application in general

Contract interpretation is a question of law reviewed de novo.

5 Cases that cite this headnote

[7] Contracts ⇐ Language of contract

When interpreting a contract, the Court looks to the language that the parties used in the contract to determine their intention.

6 Cases that cite this headnote

[8] Contracts ⇐ Language of contract

When the words of a contract are clear and explicit and lead to no absurd consequences, the search for the parties' common intent is at an end.

1 Cases that cite this headnote

Attorneys and Law Firms

*147 Andrew R. Damgaard, A. Russell Janklow of Janklow Law Firm, Prof. LLC, Sioux Falls, South Dakota, Attorneys for plaintiffs and appellants.

Kyle L. Wiese, James S. Nelson of Gunderson, Palmer, Nelson & Ashmore, LLP, Rapid City, South Dakota, Attorneys for defendants and appellees.

Opinion

GILBERTSON, Chief Justice.

[¶ 1.] In 2008, Peggy Detmers and Detmers Studios, Inc. (collectively "Detmers") brought suit against Kevin Costner and The Dunbar, Inc. (collectively "Costner"). The suit sought declaratory judgment regarding an agreement on the placement of sculptures Costner had commissioned from Detmers. After a bench trial, the court granted judgment in favor of Costner. Detmers appeals. We affirm.

FACTS

[¶ 2.] In the early 1990s, Costner envisioned building a luxury resort called "The Dunbar" on property he owned near Deadwood, South Dakota. After discussions, Costner commissioned Detmers to design 17 buffalo and Lakota warrior sculptures, intending to display them at The Dunbar's entrance. The bronze sculptures are 25% larger than life-size and depict three Lakota warriors on horseback pursuing 14 buffalo at a "buffalo jump." Detmers and Costner orally agreed that she would be paid $250,000 and would receive royalty rights in the sculptures' reproductions, which were to be marketed and sold at The Dunbar's gift shop. When The Dunbar had not been built in the late 1990s, Detmers stopped working on the sculptures.

[¶ 3.] After several months of negotiations, on May 5, 2000, Costner sent Detmers a letter detailing an agreement that would provide her additional compensation in exchange for completing the sculptures. *148 Detmers agreed and signed the letter as requested, creating a binding contract. As part of the agreement, Costner paid Detmers an additional $60,000, clarified royalty rights on reproductions, and provided her certain rights regarding display of the sculptures. Paragraph three of the agreement, which is at issue in this case, provides:

> Although I do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere, I will give you 50% of the profits from the sale of the one and one-quarter life scale sculptures after I have recouped all my costs incurred in the creation of the sculptures and any such sale. The sale price will be at our above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders).

[¶ 4.] Paragraph four of the agreement provides: "We will locate a suitable site for displaying the sculptures if The Dunbar is not under construction within three (3) years after the last sculpture has been delivered to the mold makers." Because the resort was not under construction within three

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years after the last sculpture had been delivered, Detmers and Costner began looking for display locations as required by paragraph four. Detmers suggested locations in Hill City, while Costner considered locations near Deadwood.

[¶ 5.] On January 23 or 24, 2002, Costner called Detmers and they discussed permanently placing the sculptures at a site on Costner's property where he intended to build The Dunbar.[1] The project became known as "Tatanka." Costner hired landscape architect Patrick Wyss to design Tatanka. Costner instructed Wyss to keep Detmers informed and involved in the design process. Detmers was influential in the sculptures' placement at Tatanka, including suggesting and implementing wood "mock-ups" to predetermine the exact location of each sculpture. Detmers, Costner, and Wyss were all present when the sculptures were placed at Tatanka. Tatanka was funded solely by Costner and is a separate legal entity from The Dunbar. In addition to the sculptures, Tatanka consists of a visitor center, gift shop, café, interactive museum, and nature walkways. Both Detmers and Costner spoke at Tatanka's grand opening in June 2003, expressing enthusiasm and pride in the attraction.

[¶ 6.] In 2008, Detmers brought suit against Costner, seeking a declaratory judgment that she did not agree to the placement of the sculptures as required by paragraph three of their May 2000 contract. For relief, Detmers sought an order requiring Costner to sell the sculptures with the proceeds dispersed consistent with paragraph three. Detmers claimed that because The Dunbar had not been built within ten years and the sculptures were *not* "agreeably displayed elsewhere," she was entitled to 50% of the proceeds from the sale of the sculptures.

[¶ 7.] Before trial, Costner moved to use parol evidence. Detmers objected, requesting a ruling that the May 2000 contract was unambiguous and parol evidence was therefore inadmissible. The circuit court concluded that the May 2000 contract *149 was unambiguous and denied Costner's motion to admit parol evidence. The sole issue at the bench trial was whether the sculptures were "agreeably displayed elsewhere." Costner, Detmers, and Wyss testified at trial.

[¶ 8.] After post-trial briefing, the court granted judgment in favor of Costner. The court maintained its earlier conclusion that the May 2000 contract was unambiguous. The court concluded that " '[e]lsewhere,' as used in the contract, clearly means at a site other than The Dunbar." Additionally, "[b]ecause The Dunbar has not been built, any site is elsewhere, i.e., somewhere other than The Dunbar. The placement of the sculptures at Tatanka is elsewhere." The court also concluded: "Detmers actions following the decision to place the sculptures at Tatanka indicate that she agreed to display them at that location...." Detmers appeals.

STANDARD OF REVIEW

[1] [2] [¶ 9.] "We will not set aside a trial court's findings of fact unless they are clearly erroneous." *Alto Twp. v. Mendenhall*, 2011 S.D. 54, ¶ 9, 803 N.W.2d 839, 842. "[W]e review conclusions of law under a *de novo* standard, with no deference to the trial court's conclusions of law." *Id.*

ANALYSIS

[¶ 10.] We restate and consolidate Detmers' issues on appeal to whether the circuit court erred in determining that the sculptures were "agreeably displayed elsewhere," as required under the contract. Under paragraph three, Detmers would only be entitled to specific performance if The Dunbar was not built or the sculptures were not "agreeably displayed elsewhere." The issue at trial was whether Detmers agreed to displaying the sculptures at Tatanka, which is a factual inquiry. The circuit court concluded Detmers agreed, as demonstrated by her conduct and actions, to permanent display of the sculptures at Tatanka.

[¶ 11.] On appeal, Detmers does not dispute that she agreed to display the sculptures at Tatanka. Instead, she asserts that she only agreed to the location because she had been promised or guaranteed that The Dunbar would still be built. Detmers cannot point to anything in the record supporting this assertion other than her own testimony. The circuit court found that Detmers was never promised or guaranteed that the Dunbar would be built. Costner maintained throughout this suit that he continues to attempt to build The Dunbar, but cannot promise it will happen. Detmers has not shown any findings to be clearly erroneous.

[¶ 12.] Furthermore, this action centers around a clause in the contract addressing what would happen *if the resort was not built.* The contract itself contemplates the possibility that The Dunbar might not be built. Detmers cannot assert that she was not aware that The Dunbar's future was questionable. Detmers has not demonstrated that the circuit court's finding was clearly erroneous. As to Detmers' argument that the finding

was unnecessary, the court appeared to address it because it was an issue raised by Detmers through questioning.

[3] [¶ 13.] Detmers asserts that to the extent the court used the testimony of Patrick Wyss to find that Detmers had not been guaranteed The Dunbar would be built, the court erred. The court found: "Testimony from Costner and *others associated with The Dunbar and Tatanka projects* indicates that although Costner has been attempting to build The Dunbar for years, and continues to try to build it, he has never promised Detmers or anyone else that it would actually be built." (Emphasis added.) Presumably, Wyss is an *150 "other[ ] associated with" the projects as he was the only other person to testify besides Costner and Detmers.

[¶ 14.] Wyss was prepared for trial by Costner's counsel. He testified as a fact witness, called adversely as part of Detmers' case-in-chief. Wyss was sequestered, so he had not heard Costner's testimony, given after being called adversely, or Detmers' testimony. Detmers' counsel asked whether, during the time the sculptures were being placed at Tatanka, "there was not only an understanding by [Wyss] but an understanding by Peggy Detmers that the Dunbar resort was ultimately going to be built." Wyss responded "No." Detmers' counsel then attempted to impeach Wyss with his deposition testimony where he was asked: "So the placement of the monument back in 2002, there was always an understanding, and it was being told to Peggy, that the Dunbar was still going to be built at that time; right?" Wyss responded, "That was my understanding."

[¶ 15.] Detmers made a motion after trial to strike Wyss' changed trial testimony. The court denied the motion. Detmers argues that the court should not have relied on Wyss' testimony. A review of Wyss' testimony reveals the context of Wyss' statements and his questioning. During Wyss' deposition, counsel was questioning Wyss on whether "the plan was still to build The Dunbar" when the sculptures were being placed. The context of the questioning shows that Costner and his team were still working towards building The Dunbar, and the placement of Tatanka was important to ensure The Dunbar could go forward if investors committed. Wyss explained at trial that "[t]he context of that conversation was the planned hotel...." He continued to emphasize that "there were efforts in place to attempt to get the hotel built."

[¶ 16.] Wyss' responses to Detmers' "impeachment" questions provide the necessary framework for understanding his answers. The circuit court was able to witness Wyss and the questioning at trial to determine credibility and the weight that should be afforded his testimony. We will not second-guess that determination. Even if the court did err in relying on Wyss' testimony, Detmers has not shown that the finding was clearly erroneous in light of the entire record indicating that Detmers had no reason to assume The Dunbar would be built.

[4] [5] [¶ 17.] Detmers also argues that the circuit court erred as a matter of law in its construction of the term "elsewhere." She asserts that "elsewhere" must be somewhere other than the proposed site for The Dunbar. She suggests that the circuit court's conclusion rewrites the contract. Additionally, she argues that if "elsewhere" is ambiguous, it should be construed against Costner. However, Detmers asserted before trial, and the court agreed, that the contract was unambiguous. That decision was not appealed.[2]

[¶ 18.] The circuit court concluded as a matter of law that the regular meaning of the term "elsewhere" applied. The court noted that Black's Law Dictionary defines elsewhere as "in another place, in any other place," and Webster's Dictionary defined it as "in or to another place." *See Black's Law Dictionary* 560 (8th ed. 2004). Accordingly, there must first be a designated place to determine if somewhere is *151 "another place." Paragraph three provides: "*If The Dunbar is not built* within ten (10) years *or* the sculptures are not agreeably displayed elsewhere." (Emphasis added.) The designated place is The Dunbar. The circuit court concluded that "elsewhere" meant at a place other than The Dunbar. And because The Dunbar had not been built, Tatanka was elsewhere.

[¶ 19.] Costner points out that the circuit court and Detmers both assign "elsewhere" its ordinary meaning, i.e., "in another place." The analysis diverges on whether "in another place" means another place from The Dunbar itself or from The Dunbar's intended site. Costner asserts that the circuit court was correct in concluding that "elsewhere" is in a place other than The Dunbar resort itself, which, according to the language, must be *built*. The land could not be built, but the resort could. Furthermore, the terms of the contract plainly do not say The Dunbar *site*.

[6] [7] [8] [¶ 20.] "Contract interpretation is a question of law" reviewed de novo. *Clarkson & Co. v. Cont'l Res., Inc.*, 2011 S.D. 72, ¶ 10, 806 N.W.2d 615, 618. "When interpreting a contract, 'this Court looks to the language that the parties used in the contract to determine their intention.' " *Id.* ¶

15, 806 N.W.2d at 619 (quoting *Pauley v. Simonson*, 2006 S.D. 73, ¶ 8, 720 N.W.2d 665, 667–68). "When the words of a contract are clear and explicit and lead to no absurd consequences, the search for the parties' common intent is at an end." *Nelson v. Schellpfeffer*, 2003 S.D. 7, ¶ 8, 656 N.W.2d 740, 743.

[¶ 21.] The plain words of the contract unequivocally provide that if The Dunbar was not built or the sculptures were not agreeably displayed elsewhere, then Detmers would be entitled to the relief described in paragraph three. "Elsewhere" must be understood in relation to the named place in the contract—The Dunbar. Costner is correct that to accept Detmers argument would rewrite the contract to include The Dunbar's intended location as well as the resort itself. This we will not do. *See Culhane v. W. Nat'l Mut. Ins. Co.*, 2005 S.D. 97, ¶ 27, 704 N.W.2d 287, 297 ("[W]e may neither rewrite the parties' contract nor add to its language...."). As a matter of law, the court did not err in its conclusion that Tatanka was elsewhere from The Dunbar. This conclusion is supported by giving the terms in the parties' contract their plain and ordinary meaning.

[¶ 22.] Detmers also alleges that the court was clearly erroneous in finding that Tatanka was intended to be separate and distinct from The Dunbar. She points to newspaper articles and testimony in the record indicating that if The Dunbar is built, Tatanka would be part of the resort property.

[¶ 23.] The record and numerous exhibits support the circuit court's finding that Tatanka is separate from The Dunbar. Testimony reinforced that Tatanka was constructed and managed as a separate legal entity from The Dunbar proposal. In her response to Costner's proposed findings of fact, Detmers concedes that Tatanka is a stand-alone site. Detmers has not demonstrated that the court was clearly erroneous or made an error of law in determining that Tatanka was separate from The Dunbar.

CONCLUSION

[¶ 24.] The circuit court did not err or make any clearly erroneous factual findings in determining that the sculptures are "agreeably displayed elsewhere," in the absence of a guarantee from Costner that The Dunbar would be built. Furthermore, the circuit court did not err in concluding that Tatanka was "elsewhere" under the language of the contract. We affirm.

*152 [¶ 25.] KONENKAMP, ZINTER, SEVERSON, and WILBUR, Justices, concur.

All Citations

814 N.W.2d 146, 2012 S.D. 35

Footnotes

1 During her deposition, Detmers initially denied that she received this phone call. After being confronted with telephone records, Detmers agreed Costner had called her. She then denied that Costner had suggested placement of the statutes at his Deadwood property during this call. During later questioning, she admitted that during the call he talked about The Dunbar location for the statutes.

2 "Whether the language of a contract is ambiguous is ... a question of law." *Pankratz v. Hoff*, 2011 S.D. 69, ¶ 10 n. *, 806 N.W.2d 231, 235 n. *. Even if this Court were to decide that the contract was ambiguous, the language of the contract, in addition to the findings of the circuit court, support judgment for Costner.

End of Document

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ALL FIELDS DETAIL

(42) MLS #	70294	(55) Selling	Assets
(53) Status	ACTIVE	(56) Legal Ownership	C Corporation
(43) Class	COMMERCIAL/INDUSTRIAL	(57) Current Use	Retail
(45) Type	CI Land w/Building	(58) Liquor License	No
(46) Area	Deadwood/Central City	(59) Malt Beverage	No
(47) Asking Price	$7,000,000	(60) On Premises	No
(48) Address	100 Tatanka Drive	(61) Off Premises	No
(50) City	Deadwood	(62) Size of Lot	20.01 - 40
(51) State	SD	(63) Type Lot	Other
(52) Zip	57732		
(54) Sale/Rent	For Sale		
(103) IDX Include	Y		

GENERAL

(37) VOW Include	Yes	(38) VOW Address	Yes
(39) VOW Comment	Yes	(40) VOW AVM	Yes
(64) Number of Acres	35.11	(65) Financials Available Y/N	No
(66) Agent	Michael S Porcevich - Cell: 605-545 -3210	(67) Listing Office 1	The Real Estate Center of Lead /Deadwood - Main: 605-578-3030
(70) Comp Offered Coop Broker	2.5%	(71) Comp VRC Y/N	No
(72) Earnest Money	Held at Title Company	(73) Lot Size	35.11 acres
(75) Listing Date	10/20/2021	(78) Business Name	TATANKA
(79) Owner Name	BH CONVERENCE CENTER, INC	(80) What is for Sale	LAND AND BUILDING
(81) Legal	TATANKA TRACT OF TATANKA SUDIVISION, CITY OF DEADWOOD , LAWRENCE COUNTY, SOUTH DAKOTA.	(82) Approx Building SQFT	3,841
(83) # of Building Levels	1	(84) Year Built	2003
(86) Parking Spaces	50+	(87) Desc. of Going Concern	SPECTACULAR COMMERCIAL PROPERTY, PARKING, BUILDINGS , ROOM TO EXPAND-35 ACRES & THE MOST AMAZING VIEWS TO BE FOUND. ALL CITY SERVICES, STRATEGICALLY LOCATED ON DEADWOODS FAST GROWING NORTHERN BOUNDARY.
(88) Directions	HIGHWAY 85 TO TATANKA DRIVE - ACROSS THE HIGHWAY FROM THE LODGE AT DEADWOOD.	(89) Foreclosure	No
(90) Short Sale	No	(91) Auction Y/N	No
(104) Update Date	11/5/2021	(105) Status Date	11/5/2021
(106) HotSheet Date	11/5/2021	(107) Price Date	11/5/2021
(108) Input Date	11/5/2021 1:25 PM	(110) Associated Document Count	2
(111) Owner Phone	O/STATE	(112) Price Per Acre	$199,373
(113) Original Price	$7,000,000	(114) Subdivision Y/N	No
(32) Time Share	No	(34) Covenants	Yes
(5) Confirm Listing Agreement Attached	No	(3) In City	Yes
(2) In County	No	(6) Cumulative DOM	17
(15) Picture Count	29	(16) Days On Market	17
(21) Input Date	11/5/2021 1:25 PM	(22) Update Date	11/5/2021 2:22 PM

FEATURES

CONSTRUCTION	COOLING	OCCUPANT	OWNER SALARY/EXPENSES
Frame	Refrig. C/Air	Vacant	No
SIDING	UTILITIES	SAFETY FEATURES	MARQUEE
Wood Siding	Gas Master Meter	Smoke Detectors	No
ROOF	Electric Master Meter	Sprinkler System	OWNER NON-COMPETE
Metal	SYSTEMS	Fire Alarm	No
DOCUMENTS ON FILE	Breaker	Handicap Access	TRAINING INCLUDED
Covenants	UTILITIES-ELECTRIC	Security System	None
Easements	BHPL	EXTRAS	# OF EMPLOYEES
Legal Description	ELECTRIC-LOCATION	Hi-Traffic Location	0
SHOWING INSTRUCTIONS	To Lot	High Visibility	ZONING-DEADWOOD
Appointment Only	UTILITIES-GAS	Highway Access	Commercial Hwy

EXHIBIT D

Filed: 1/18/2022 4:57 PM CST Lawrence County, South Dakota 40CIV22-000017

FEATURES

Call Agent	MDU	Kitchen Area	TERMS
BASEMENT/SUBSTRUCT	UTILITIES-WATER	Landscaped	Cash
Slab	City Water	Restaurant	New Loan
HEATING	PARKING	View	
Natural Gas	Paved		
Forced Air	Parking Lot		
	18 Wheel Acc		
	18 Wheel Park		

FINANCIAL

(117) Photo Add (Y/N)	Yes	(121) Owner Finance (Y/N)	No
(122) Possession	CLOSING	(123) Flood Plain (Y/N/U)	Unknown
(131) Water Assessment	METERED	(135) RE Taxes $	15959.30
(136) RE Tax Year	20	(143) Sewer Assessment	CITY

REMARKS

(133) Remarks SPECTACULAR COMMERCIAL PROPERTY, PARKING, BUILDINGS, ROOM TO EXPAND-35 ACRES & THE MOST AMAZING VIEWS TO BE FOUND. ALL CITY SERVICES, STRATEGICALLY LOCATED ON DEADWOODS FAST GROWING NORTHERN BOUNDARY. PLEASE CONTACT MIKE PERCEVICH, REAL ESTATE CENTER OF LEAD-DEADWOOD, 605-645-3210.

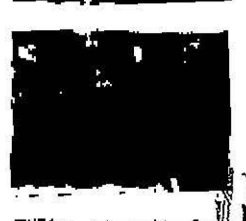
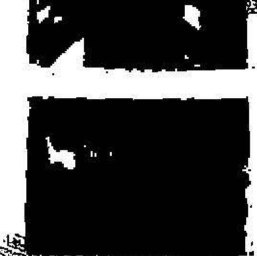
ADDENDUM

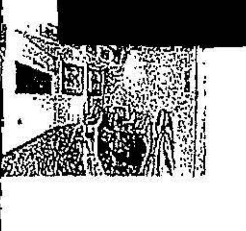
(142) Addendum TATANKA STATUES ARE NOT INCLUDED-WILL BE RELOCATED BY SELLER. PLEASE CALL OR TEXT MIKE PERCEVICH, 605 -645-3210, FOR ALL APPOINTMENTS TO SHOW.

AGENT TO AGENT REMARKS

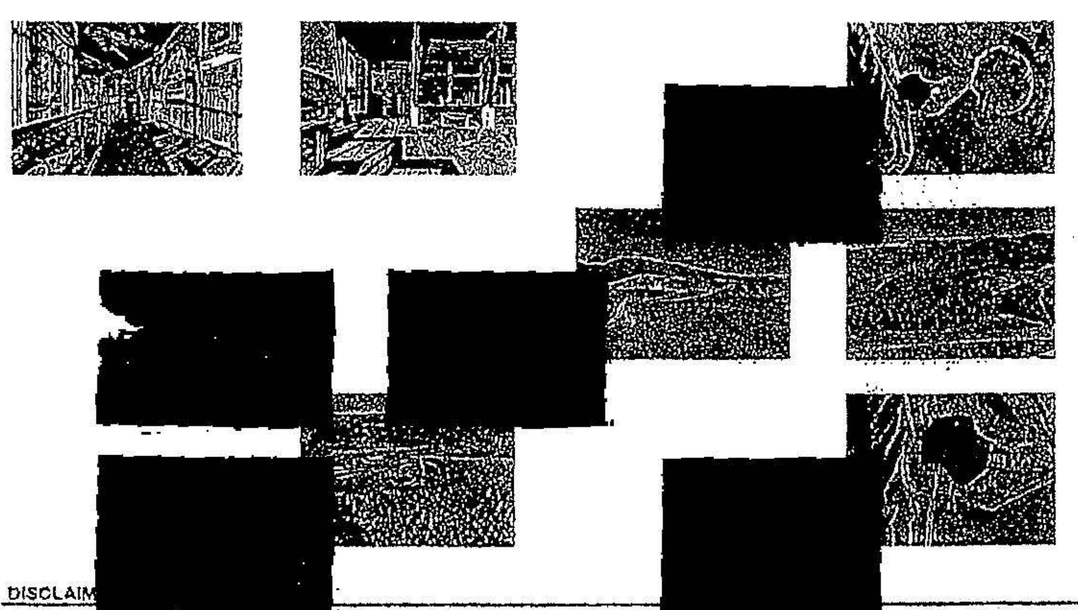
(118) Agent to Agent Remarks Buyer and Buyer's Agent are responsible to verify all information on this MLS document. Property manager delayed listing.

ADDITIONAL PICTURES



Filed: 1/18/2022 4:57 PM CST Lawrence County, South Dakota 40CIV22-000017



DISCLAIM

Not intended for public use. Data contained herein is provided by the listing agent and is believed to be accurate, but should not be relied upon without verification. All measurements are approximate.

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

PEGGY A. DETMERS,	)	FILE NO. 40CIV22-17
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**ANSWER**
KEVIN COSTNER,	)	
	)	
Defendant.	)	
	)	

Comes now Defendant Kevin Costner, by and through Marty J. Jackley of Gunderson, Palmer, Nelson & Ashmore, LLP, and for his Answer to Plaintiff's Complaint states as follows:

1. Plaintiff's Complaint fails to state a claim against this Defendant upon which relief can be granted and moves to dismiss under Rule 12.

2. Defendant denies each statement in Plaintiff's Complaint, except for those matters that are specifically admitted or qualified and holds Plaintiff to her strict burden of proof thereon.

3. With respect to paragraphs 1-6 of Plaintiff's Complaint, Defendant admits.

4. With respect to paragraph 7 of Plaintiff's Complaint, Defendant denies and holds Plaintiff to her strict burden of proof thereon.

5. With respect to paragraphs 8-14 of Plaintiff's Complaint, Defendant admits.

6. With respect to paragraph 15 of Plaintiff's Complaint, Defendant admits that paragraph 3 of the Contract is appropriately quoted; however, Defendant denies that any inference to said paragraph in isolation is controlling including with respect to paragraph 4 of said Contract that provides:

> We will locate a suitable site for displaying the sculptures if The Dunbar is not under construction within three (3) years after the last sculpture has been

delivered to the mold makers. In the meantime, until the sculptures are put on display, I will permit you to market and sell reproductions and you can retain eighty percent 80% of the gross retail sales price and pay 20% to me. Once the sculptures are put on public display in public view, agreed upon by both parties (but with the final decision to be made by me if we do not agree); the percentages will reverse, 80% of the gross retail sales price to me and 20% to you.

7. With respect to paragraph 16 of Plaintiff's Complaint, Defendant admits.

8. With respect to paragraph 17 of Plaintiff's Complaint, Defendant denies the same based upon insufficient information.

9. With respect to paragraphs 18-22 of Plaintiff's Complaint, Defendant admits.

10. With respect to paragraph 23 of Plaintiff's Complaint, Defendant admits that Detmers brought an action against Costner in 2008; however, further inferences limiting that action is denied and holds Plaintiff to her strict burden of proof thereon.

11. With respect to paragraphs 24-26 of Plaintiff's Complaint, Defendant admits.

12. With respect to paragraphs 27-30 of Plaintiff's Complaint, it is admitted that Defendant prevailed in *Detmers v. Costner*, 814 N.W.2d 146 (S.D. 2012) and said decisions speaks for itself and any further inferences sought by Plaintiff are specifically denied.

13. With respect to paragraph 31 and 32 of Plaintiff's Complaint, Defendant admits that Plaintiff has continued to receive royalties from the goods sold at Tatanka pursuant to the parties' agreement. All other inferences are denied.

14. With respect to paragraphs 33-35 of Plaintiff's Complaint, Defendant admits.

15. With respect to paragraphs 36-37 of Plaintiff's Complaint, Defendant admits that the property is listed consistent with Exhibit D.

16. With respect to paragraph 38 of Plaintiff's Complaint, Defendant denies and holds Plaintiff to her strict burden of proof thereon. Based upon the facts and circumstances, including

Plaintiff's rejection of the proposed location, Defendant has the ability to make the location determination pursuant to paragraph 4 of the parties' agreement.

17. With respect to paragraph 39 of Plaintiff's Complaint, Defendant admits.

FIRST CAUSE OF ACTION – BREACH OF CONTRACT

18. With respect to paragraph 40 of Plaintiff's Complaint, Defendant hereby incorporates his previous answers as set forth in full.

19. With respect to paragraph 41 of Plaintiff's Complaint, the Supreme Court decision speaks for itself and any further inferences sought to be derived therefrom are denied.

20. With respect to paragraph 42 and 43 of Plaintiff's Complaint, Defendant denies and holds Plaintiff to her strict burden of proof thereon.

ALTERNATIVE COUNT – DECLARATORY JUDGMENT

21. With respect to paragraph 44 of Plaintiff's Complaint, Defendant hereby incorporates his previous answers as set for the in full.

22. With respect to paragraph 45 of Plaintiff's Complaint, the Supreme Court decision speaks for itself and any attempted inferences to be drawn therefrom by Plaintiff are hereby denied and Defendant holds Plaintiff to her strict burden of proof thereon.

23. With respect to paragraphs 46-49 of Plaintiff's Complaint, Defendant denies and holds Plaintiff to her strict burden of proof thereon, and specifically requests that any declaration recognizing Defendant's authority to remove the sculptures consistent with paragraph 4 of the agreement to be the final decision of Defendant.

AFFIRMATIVE DEFENSES

24. Plaintiff's claims against Defendant are barred in whole or part by the applicable statute of limitations.

25. Plaintiff's claims are barred by the doctrine of laches, waiver or estoppel.

26. Plaintiff's claims are barred by the doctrines of *res judicata* and collateral estoppel.

27. Plaintiff's claims are barred based upon her failure to appropriately mitigate damages.

28. Plaintiff's claims are barred for lack of ripeness.

WHEREFORE, Defendant prays for relief as follows:

1. For judgment in favor of Defendant and against Plaintiff on all issues, dismissing Plaintiff's Complaint with prejudice and on the merits and otherwise permitting removal of the sculptures consistent with paragraph 4 of the parties' agreement;

2. For Defendant's costs, disbursements and attorney fees as permitted by law; and

3. For any such other relief as the Court may deem just and equitable.

DEFENDANT DEMANDS TRIAL BY JURY

Dated this 11th day of February 2022.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: *_/s/ Marty J. Jackley_*
Marty J. Jackley
Attorneys for Defendant
111 West Capitol Ave., Suite 230
Pierre, South Dakota 57501
Telephone: (605) 494-0105
E-mail: mjackley@gpna.com

CERTIFICATE OF SERVICE

I hereby certify on February 11, 2022, a true and correct copy of Defendant's **ANSWER** was electronically filed through South Dakota's Odyssey File and Serve Portal, and served upon the following:

A. Russell Janklow
Johnson, Janklow, Abdallah & Reiter, LLP
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PO Box 2348
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Sioux Falls, SD 57117-5027
(605) 338-4304
Andy.Damgaard@woodsfuller.com
Attorneys for Plaintiff

By: */s/ Marty J. Jackley*
Marty J. Jackley

	A	B
1		To Calculate # of Days Between Two Dates
2		
3	9/28/2022	Input Date 1
4	10/18/2022	Input Date 2
5	20	Result: Calendar days between Date 1 and Date 2
6	15	Result: Week days between Date 1 and Date 2
7		
8		
9		
10		To Add # of Days to a Date (use for calculating deadlines)
11	9/28/2022	Input Date 1
12	20	Input Number of Days to Add
13	10/18/2022	Result: End Date

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

PEGGY A. DETMERS,	)	FILE NO. 40CIV22-17
	)	
Plaintiff,	)	
	)	
v.	)	**DEFENDANT'S BRIEF IN**
	)	**OPPOSITION TO PLAINTIFF'S**
KEVIN COSTNER,	)	**MOTION FOR SUMMARY JUDGMENT**
	)	
Defendant.	)	

COMES NOW Defendant Kevin Costner (Costner) by and through his attorneys of record, Marty J. Jackley and Catherine A. Seeley of Gunderson, Palmer, Nelson & Ashmore, LLP, and respectfully submits this Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment.

FACTUAL AND PROCEDUAL BACKGROUND

In the 1990s, Costner commissioned Plaintiff Peggy Detmers (Detmers) to create a total of seventeen sculptures (fourteen bison and three Lakota warriors on horseback) to be displayed at a resort Costner intended to build near Deadwood, South Dakota. The resort was to be called "The Dunbar" and was to have amenities consistent with a five-star resort.

When The Dunbar had not been built by the late 1990s, Detmers ceased working on the sculptures until she and Costner negotiated and entered into a written contract to provide certain assurances to both parties. By letter dated May 5, 2000, Costner laid out the terms of the parties' agreement which Detmers ratified by signing it. The contract contained provisions relating to Detmers's compensation, the parties' ownership interests in the sculptures, royalty payments to

the parties,[1] and Detmers's limited input on the display of the sculptures in the event The Dunbar is not built.

The contract provided that Costner would be "the sole owner of all rights in the sculptures, including the copyright," but allowed that Detmers could have limited say in the display of the sculptures if The Dunbar is not built within ten years. Specifically, paragraph three of the contract provides in part "if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere," Costner would give Detmers fifty percent of his profits if he chose to sell the sculptures and would assign the copyright back to her.[2]

The Dunbar had not been built as contemplated by the parties, and each sought out alternative locations at which to display the sculptures in accordance with the "agreeably displayed elsewhere" provision of the contract. Ultimately, Costner and Detmers agreed to place the sculptures on a portion of real property originally intended to be a part of The Dunbar resort. At that time, the parties still contemplated that The Dunbar would be constructed on the adjoining property. To accompany the sculptures, Costner constructed a visitors' center, gift shop, café, interactive museum, and nature walkways. The attraction became known as Tatanka.

---

[1] While the parties used the term "royalty participation" in the contract, the context of the contract makes clear they were not referring to royalty payments, but were instead referring to the parties receiving a portion of the proceeds from the sale of reproductions of the sculptures.
[2] The entirely of paragraph three of the contract reads as follows:

> Although I [(Costner)] do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere, I will give you [(Detmers)] 50% of the profits from the sale of the one and one-quarter life scale sculptures after I have recouped all my costs incurred in the creation of the sculptures and any such sale. The sale price will be at our (sic) above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders).

In 2008, when The Dunbar still had not been built, Detmers sued Costner, alleging that he breached the terms of their contract. Detmers specifically alleged that the sculptures were not "agreeably displayed elsewhere" because she did not agree to place them on The Dunbar property if The Dunbar was never built. During the course of the litigation, the circuit court ruled that the parties' contract was unambiguous and denied Costner's request to introduce parole evidence relating to the parties' intent. The case proceeded to a court trial on the merits.

Following the trial, the circuit court ruled for Costner. The circuit court held that Tatanka constituted "elsewhere" under the terms of the contract and that Detmers agreed to the placement of the sculptures at Tatanka "for the long term." Based on these conclusions, the circuit court specifically held that "Costner has fully performed under the terms of the contract."

Detmers appealed the circuit court's ruling to the South Dakota Supreme Court, which affirmed its decision. The Supreme Court noted in its decision that the circuit court concluded Detmers agreed to the permanent display of the sculptures at Tatanka.

Since the Supreme Court's decision in *Detmers v. Costner*, 2012 S.D. 35, 814 N.W.2d 146, the sculptures have remained at Tatanka. However, Black Hills Conference Center, Inc., an entity 98.5% owned by Costner, listed the real property upon which Tatanka sits for sale. The real estate listing for the property states, "Tatanka statues are not included- will be relocated by seller." Based on this real estate listing, Detmers now brings this suit alleging Costner has committed an anticipatory repudiation of the contract and asks for a declaratory judgment that she has perpetual display rights in the sculptures.

ARGUMENT

"[S]ummary judgment is an extreme remedy, and is not intended as a substitute for trial." *Discovery Bank v. Stanley*, 757 N.W.2d 756, 762 (S.D. 2008). Summary judgment is

authorized when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." SDCL 15-6-56(c). All reasonable inferences which may be drawn are to be viewed in favor of the non-moving party. *Titus v. Chapman*, 2004 SD 106, ¶ 13, 687 N.W.2d 918, 923 (citing *Morgan v. Baldwin*, 450 N.W.2d 783, 785 (SD 1990)). The moving party has the burden to clearly show the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. *Id.*

I. Costner has not committed an anticipatory repudiation of the parties' contract.

"An anticipatory breach of a contract or anticipatory repudiation is 'committed before the time when there is a present duty of performance and results from words or conduct indicating an intention to refuse performance in the future.'" *Union Pacific R.R. v. Certain Underwriters at Lloyd's London*, 2009 S.D. 70, ¶ 30, 771 N.W.2d 611, 622 (quoting Williston on Contracts § 63:29 (4th ed. 2000)). An anticipatory repudiation occurs when a party "'*unequivocally indicat[es]* that the party will not perform when performance is due.'" *Id.* (quoting *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 46, ¶ 31, 714 N.W.2d 884, 894) (emphasis added).

Necessarily, an anticipatory repudiation contemplates a future breach of contract. To establish a claim for breach of contract, a plaintiff must show "(1) an enforceable promise; (2) a breach of the promise; and, (3) resulting damages." *Bowes Construction, Inc. v. South Dakota Dept. of Transp.*, 2010 S.D. 99, ¶ 21, 793 N.W.2d 36, 43 (citations omitted). "Whether a contract has been breached is a pure question of fact for the trier of fact to resolve." *Weitzel*, 2006 S.D. 46, ¶ 31, 714 N.W.2d at 894.

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A. The language of the parties' contract does not provide Detmers continuing rights in the future display of the sculptures nor does it impose an ongoing obligation that Costner display his sculptures at Tatanka.

"Contract interpretation is a question of law," and when interpreting contract provisions, courts look to "the language that the parties used in the contract to determine their intention." *Detmers v. Costner*, 2012 S.D. 35, ¶ 20, 814 N.W.2d 146, 151 (cleaned up and quotations omitted). "When the words of a contract are clear and explicit and lead to no absurd consequences, the search for the parties' common intent is at an end." *Id.* (quotation omitted). A "'contract's language must be construed according to its plain and ordinary meaning and a court cannot make a forced construction or a new contract for the parties.'" *Friesz ex rel. Friesz v. Farm & City Ins. Co.*, 2000 S.D. 152, ¶ 8, 619 N.W.2d 677, 680 (quoting *St. Paul Fire & Marine Ins. Co. v. Schilling*, 520 N.W.2d 884, 887 (S.D. 1994)); *see Edgar v. Mills*, 2017 S.D. 7, ¶ 28, 892 N.W.2d 223, 231 (citation omitted) ("When the language of a contract is plain and unambiguous, it is [a court's] duty to interpret it and enforce it as written."). As a claim for anticipatory repudiation requires that a breach of contract is essentially guaranteed, Detmers must first show that she is still entitled to some benefit under the terms of the contract.

The contract between Costner and Detmers consists of five paragraphs which outline various interests and obligations of the parties. The instant action focuses primarily on paragraph three of the agreement which provides in relevant part that "if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere," certain remedies may be available to Detmers. This provision placed an obligation on Costner to either construct The Dunbar or display his sculptures at another agreeable location. While The Dunbar did not come to fruition, Costner nevertheless met his obligation under the contract by locating an agreeable location for the sculptures' display and erecting additional amenities to

create a stand-alone attraction at Tatanka. A court of competent jurisdiction already found that Costner fully performed that obligation, and the South Dakota Supreme Court affirmed its decision.

The contract does not provide that Detmers has eternal control or input over the placement of Costner's sculptures, and this Court should not read such a provision into the parties' agreement.[3] The contract only contemplates that the parties must agree on the placement of the sculptures in the event that The Dunbar is not built within ten years. It does not contemplate that Costner must seek Detmers's approval any time he wishes to exercise his right to move his sculptures going forward. Costner placed his sculptures at Tatanka, the parties' agreed upon site, in good faith for several years. As he has met his obligation to agreeably display his sculptures at a location other than The Dunbar, such obligation is discharged, and he has no further promise to perform under the parties' contract.

Furthermore, reading such a continuing obligation into the provision would create an absurd result in relation to the contract as a whole. Courts "do not give contracts such broad interpretations as to produce an absurd result." *Union Pacific R.R.*, 2009 S.D. 70, ¶ 14, 771 N.W.2d at 616 (quotation omitted). "An absurd result is one that is ridiculously incongruous or unreasonable; a result that the parties, presumed to be rational persons pursuing rational ends, are very unlikely to have agreed upon." *Id.* (cleaned up and quotations omitted). The parties' contract explicitly states that Costner would be the "sole owner of all rights in the sculptures, including the copyright." It would be an absurd conclusion in relation to his sole ownership rights that Costner's use, enjoyment, and display of his personal property would be forever

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[3] Adding such a substantive provision to the parties' contract would be particularly inappropriate at this summary judgment stage as all reasonable inferences are to be drawn in Costner's favor.

encumbered by Detmers's discretion.

Had the parties intended to grant Detmers a perpetual interest in the placement of the sculptures, they could have done so. The parties demonstrated an understanding of how to create continuing rights within the contract itself in that they provided that Detmers would "always be attached [to the sculptures] through [her] royalty participation" in paragraph two. Because the parties chose not to include a provision allowing Detmers to have a continuing say in the placement of the sculptures, it is apparent that they did not intend to create such an ongoing promise or obligation. As the parties knew how to, yet chose not to, include such a provision in their contract, this Court should not now write in such an obligation at Detmers's request.

As Costner has no contractual obligation to involve Detmers in the subsequent placement of his sculptures, Detmers is unable to show that he will breach their contract. Accordingly, she cannot show that Costner has anticipatorily repudiated their contract as a matter of law, and her motion for summary judgment should be denied.

B. Even if this Court finds that Detmers has some continuing interest in the future placement of the sculptures, the real estate listing does not constitute an unequivocal indication of an intent not to perform under the contract.

An anticipatory repudiation only exists when a party *unequivocally* indicates it will not perform its obligation under a contract when performance is due. *Weitzel*, 2006 S.D. 45, ¶ 31, 714 N.W.2d at 894. When one party makes an unequivocal statement or takes and unequivocal action indicating a future breach, an innocent party is not required to sit idly by and wait for such breach to occur; rather, it may treat the unequivocal indication as an immediate breach and sue for breach of contract. *Id.* "Whether a contract has been breached is a pure question of fact for the trier of fact to resolve." *Id.*

Even if this Court determines that Detmers retains some interest in the future placement of the sculptures, the real estate listing alone does not constitute an unequivocal indication that Costner will breach parties' contract. As an initial matter, the sculptures constitute personal property and were always intended to remain separate and distinct from the real property upon which they sit. Since the creation of Tatanka, the sculptures have been displayed on real property largely owned and controlled by Costner. This circumstance allowed the parties control over whether the sculptures could remain. Now however, Costner wishes to exercise his right to sell the real property upon which his sculptures sit, but Detmers argues that their contract requires he either (1) retain his real property to display his sculptures or (2) surrender his personal property right in the sculptures upon the sale of that real property. Such an argument is untenable as such restraints on alienation are repugnant. *See* SDCL § 43-3-5.

Furthermore, a real estate listing does not often communicate a seller's last, best, and only offer of sale, but often opens itself up for further negotiations. Sellers do not always sell their property once it is listed, and if they do, the final agreement is not often exactly in line with the terms outlined on the original listing. The current real estate listing may indicate Costner's current intention to relocate his sculptures, but it does not constitute an unequivocal statement that such relocation will occur or that such relocation could not result in an alternative agreeable display. At the very least, the contents of the real estate listing create a genuine issue of material fact as to the significance of the listing, and therefore, a decision on such ground is not amenable to summary judgment.

Even if this Court determines that the language of the real estate listing is an unequivocal indication that Costner's sculptures will be removed from Tatanka, it most definitely does not constitute an unequivocal statement that Costner will not locate an

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alternative agreeable location in order to comply with the contract's terms. The sculptures originally came to be placed at Tatanka because Costner located the site and Detmers ultimately agreed to it. Nothing in the contract requires that he consult with Detmers prior to considering or scouting new locations for alternative agreeable placements of his sculptures.

Accordingly, as the real estate listing is not an unequivocal statement that Costner will breach his obligations under the contract, and as it at the very least creates a factual question to be determined at trial, the statement does not give rise to an anticipatory repudiation of the contract as a matter of law, and Detmer's motion for summary judgment should be denied.

C. Detmers's reliance on the phrase "permanent display" is misapplied.

Detmers attempts to argue that any attempt to move the sculptures from Tatanka would constitute a breach of the parties' contract because the South Dakota Supreme Court used the phrase "permanent display" when describing the parties' agreement to Tatanka in the prior action. Detmers now claims that the parties cannot relitigate whether the sculptures may be moved because that issue has already been litigated and decided by the prior court.[4] However, Detmers's argument misconstrues the word "permanent" as something more eternal than its definition and legal use suggest.

The Oxford English Dictionary online defines "permanent" as "lasting or intended to last or remain unchanged indefinitely." PERMANENT, Lexico, Oxford English and Spanish Dicitonary, available at https://www.lexico.com/en/definition/permanent (last accessed July 8, 2022). Indefinitely does not mean eternally. Rather, indefinitely contemplates that

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[4] While the South Dakota Supreme Court did state that the circuit court found that the parties had agreed to the "permanent display of the sculptures at Tatanka," it is unclear at this point whether the permanency issue was in fact litigated and decided. *Detmers*, 2012 S.D. 35, ¶ 10, 814 N.W.2d 146. Rather, the parties seemingly continued to discuss the possibility that The Dunbar would be built which could have resulted in the sculptures' relocation.

circumstances may arise which necessitate or provide for a change. Therefore, under this definition, Costner had intended that his sculptures be a permanent display in that they were intended to remain at Tatanka indefinitely, that is, for an unspecified period of time, when the South Dakota Supreme Court's decision in *Detmers v. Costner*, came down in 2012.

While the word permanent may carry a connotation that it will endure forever, the more limited definition relating to an indefinite period is more consistent with the term's use in legal proceedings. Many legal terms and final judgments carry the adjective "permanent," but very few indicate circumstances which will never change. For example, "permanent alimony" which is defined in Black's Law Dictionary as "[a]limony payable in [usually] weekly or monthly installments either *indefinitely* or until a time specified by court order." PERMANENT ALIMONY, Black's Law Dictionary (11th ed. 2019). The definition of "permanent injunction" even explicitly recognizes that permanent does not mean eternal; its definition reads "[a]n injunction granted after a final hearing on the merits. Despite its name, a permanent injunction *does not necessarily last forever.*" INJUNCTION, Black's Law Dictionary, (11th ed. 2019). *See also* PERMANENT EMPLOYMENT, Black's Law Dictionary, (11th ed. 2019) ("Work that, under a contract is to continue *indefinitely until either party wishes to terminate* it for some legitimate reason."); PERMANENT DISABILITY, Black's Law Dictionary, (11th ed. 2019) (relating an indefinite, not eternal duration); PERMANENT INJURY, Black's Law Dictionary, (11th ed. 2019) (referring to an indefinite, not eternal period); PERMANENT LAW, Black's Law Dictionary, (11th ed. 2019) ("A statute that continues in force for an indefinite time."); PERMANENT TREATY, Black's Law Dictionary, (11th ed. 2019) (relating a treaty that contemplates but does not ensure ongoing performance).

When the Supreme Court referenced the parties' agreement to the sculptures'

"permanent display" at Tatanka, the parties had intended it to remain there indefinitely—that is, without a fixed end period. As time progressed and circumstances changed, their permanent nature changed as well, and it has become appropriate to allow their owner to relocate them as he sees fit. Accordingly, Detmers may not rely on the Supreme Court's use of the term "permanent" to create a new and eternal obligation on Costner as it relates to the parties' contract, and her motion for summary judgment on that basis should be denied.

II. The plain language of the contract and the courts' prior holdings make clear that Detmers has no continuing rights regarding future placements of the sculptures.

Detmers's request for declaratory judgment on this matter should lead to one result: she has no continuing interest in the placement of Costner's sculptures. As discussed above and in Defendant's Brief in Support of Its Motion for Summary Judgment, the language of the contract does not explicitly provide Detmers continuing rights in future placements and displays of Costner's sculptures and reading such a continuing right and obligation into it would create an absurd and untenable result.

In the prior case, the trial court specifically held that "Costner has fully performed under the terms of the contract." The Supreme Court affirmed the trial court's decision, and Costner should be relieved from any implication that he needs to seek Detmers's approval relating to future placements and displays of his sculptures.

CONCLUSION

Costner is entitled to summary judgment in that he has no further obligation to involve Detmers in the subsequent placement and display of his sculptures. However, if this Court declines to issue summary judgment in favor of Costner, genuine issues of material fact exist to preclude issuance of summary judgment in favor of Detmers. Detmers's claim for anticipatory

repudiation is not support by the law or the facts, and accordingly, her motion for summary judgment on that ground should be denied. Detmers's request for declaratory judgment can lead only to the conclusion that she has no continuing rights to provide input on the future displays of Costner's sculptures.

Dated this 8th day of July, 2022.

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CERTIFICATE OF SERVICE

I hereby certify on July 8, 2022, a true and correct copy of **DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** was electronically filed through South Dakota's Odyssey File and Serve Portal, and served upon the following:

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

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PEGGY A. DETMERS,

Plaintiff,

v.

KEVIN COSTNER,

Defendant.

40CIV22-000017

REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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The Plaintiff, Peggy Detmers ("Detmers"), respectfully submits the following Reply Brief in support of her Motion for Summary Judgment.

I. Enforcing the Agreement as Interpreted by the Trial Court and Affirmed by the South Dakota Supreme Court is not Absurd or an Unlawful Restraint on Alienation.

A. The agreement to permanently display the sculptures in not absurd.

The parties' May 5, 2000 contract required the resort to be built within ten years or the sculptures agreeably displayed elsewhere. (Damgaard Aff. Ex. B, ¶ 3). Thus, in the previous action, the trial court held that the contract required the Dunbar to be built or that the parties make a subsequent agreement concerning the location of the sculptures. (*Id.* at Ex. A, P. 7, CL #7). The trial court found that the latter occurred when the parties agreed Tatanka would be the "*final* display area

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for the sculptures." (*Id.* at p. 9, ¶ 14) (emphasis added). To conclude otherwise, according to the trial court, "would cause an absurd result." (*Id.*).

The South Dakota Supreme Court affirmed the trial court and held that the parties agreed to "*permanent* display of the sculptures at Tatanka." *Detmers v. Costner*, 2012 SD 35, ¶ 10, 814 N.W.2d 146, 149 (emphasis added). The Supreme Court specifically stated the parties reached their agreement sometime after they had a phone call where "they discussed *permanently* placing the sculptures at a site on Costner's property where he intended to build the The Dunbar (i.e. the resort)." *Id.* at ¶ 5, 814 N.W.2d at 148 (emphasis added).

Now that Costner intends to unilaterally relocate the sculptures, he claims it would be "an absurd conclusion" to hold that the sculptures "would be forever encumbered by Detmers's discretion." (Def.'s Br. in Opp'n, pp. 6-7). According to Costner, "[a]s time progressed and circumstances changed, their [the sculptures] permanent nature changed as well, and it has become appropriate to allow their owner [Costner] to relocate them as he sees fit." (*Id.* at p. 11). In other words, the agreement to permanently and finally display the sculptures at Tatanka is, at the discretion of Costner, transitory and temporary now that he no longer intends to build the resort, and any holding to the contrary would be absurd.

Despite Costner's assertions, however, permanency and finality are the antithesis of transitory and temporary. An agreement to permanently and finally

display the sculptures negates any notion that Costner can unilaterally relocate the sculptures "as he sees fit" without being in breach of that agreement. And an agreement that would give Costner unfettered discretion and place Detmers in a position of servitude is no agreement at all.[1]

Costner's position, if accepted, would pervert the prior proceedings and impugn the integrity of the fact finding process. *Hayes v. Rosenbaum Signs and Outdoor Adv. Inc.*, 2014 SD 64, ¶ 12, 853 N.W.2d 878, 882-883 (holding the gravamen of judicial estoppel is the "intentional assertion of an inconsistent position that perverts the judicial machinery"). Indeed, it was Costner that successfully argued that he and Detmers agreed to permanently display the sculptures at Tatanka. *Detmers*, 2012 SD 35 at ¶ 10, 814 N.W.2d at 149 ("The circuit court concluded Detmers agreed, as demonstrated by her conduct and actions, to permanent display of the sculptures at Tatanka"). As a result, Costner is estopped from now taking the position that their agreement was temporary or

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[1] Costner goes to great lengths in his Brief arguing that "permanent" should be given a legal definition such as "permanent alimony," "permanent employment," and "permanent treaty." (Def.'s Br. in Resistance pp. 9-10). In the absence of a legal term of art, however, words are to be given their plain and ordinary meaning. *Matter of Certification of Question of Law*, 2021 S.D. 35, ¶ 15, 960 N.W.2d 829, 834; *Gloe v. Union Ins. Co.*, 2005 SD 30, ¶ 29, 694 N.W.2d 252, 260. Moreover, Costner was not required to display the sculptures at Tatanka for eternity. Instead, he could have attempted to obtain Detmers' agreement to display them at another location or sell them pursuant to paragraph 3 of their contract.

subject to his discretion to relocate the sculptures. *Hayes*, 2014 SD 64 at ¶ 12, 853 N.W.2d at 882-883.

Part of Detmers' compensation included royalty rights in reproductions of the sculptures. (Damgaard Aff. Ex. B, ¶ 2). The existence of Costner's 5-star resort was so important to Detmers that she ceased working on the sculptures when the resort was not under construction. *Detmers*, 2012 SD 35 at ¶ 2, 814 N.W.2d at 147. The subsequent written contract between the parties clarified Detmers' royalty rights and provided her with "certain rights regarding display of the sculptures," which included the requirement that she agree to the display of the sculptures in the absence of the resort. *Id.* at ¶ 3; 814 N.W.2d at 148; (Damgaard Aff. Ex. B, ¶ 3).

Detmers spent six years creating the sculptures and knew part of her compensation for doing so was tied to royalties from reproductions. (Compl., ¶ 16, Answer, ¶ 7). It is therefore not absurd and not even surprising that she, as the artist who created the sculptures, would demand for and contractually receive, some say in where the sculptures were displayed if the resort were not built.[2]

Detmers and Costner were free to contract and agree as they saw fit. Given their freedom to contract, the "standard for relative absurdity should be high."

[2] What is absurd and would render the contract illusory is Costner's position that once he obtained Detmers' agreement to display the sculptures, he was discharged from all obligations and could turn around and relocate them wherever he desired. Detmers responded to that argument in her Response to Costner's Brief in Support of his Motion for Summary Judgment. Those same arguments will therefore not be repeated here.

Matter of Appeal by Implicated Individual, 2021 SD 61, ¶ 25, 966 N.W.2d 578, 585. While Costner may regret his agreement under the current circumstances, it is not the role of courts to relieve him from what he views now as a bad bargain. *Weekley v. Weekley*, 1999 SD 162, ¶ 19, 604 N.W.2d 19, 24.

B. The agreement to permanently display the sculptures at Tatanka or sell them in accordance with paragraph 3 of the contract is not an unlawful restraint on alienation.

Contrary to Costner's position, the agreement to permanently display the sculptures at Tatanka is not an unlawful restraint on alienation or a requirement that the sculptures be displayed at Tatanka for "eternity." Costner is free to sell the real estate upon which the sculptures are located. He was also free to, and in fact has, unequivocally indicated he will no longer display the sculptures at Tatanka. The parties, however, expressly contemplated that in their contract, in such event, the sculptures would be sold in accordance with paragraph 3.[3]

II. No Fact Issue Exists with Respect to the Real Estate Listing as it is in Writing and Unambiguous.

Generally, whether an anticipatory repudiation has occurred is a question of fact. 23 Williston on Contracts § 63:45 (4th ed.). "An exception applies where the repudiation is in writing, and where the terms are unambiguous, in which case a

[3] In that regard, paragraph 3 is the opposite of a restraint on alienation as it provides for a sale. It also provides very favorable terms for Costner, who is entitled to recoup the costs incurred in creating the sculptures, the costs associated with the sale, and half of the profits from the sale. (Damgaard Aff. Ex. B, ¶ 3).

court may resolve the issue as a matter of law." *Id.*; *see also Rhodes v. Davis*, 628 Fed. Appx. 787, 790 (2d Cir. 2015) (unpublished) ("While the question of anticipatory breach is generally for the jury, where, as here, the relevant communications are in writing and unambiguous, the issue may be decided as a matter of law") (citing *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111-112 (2d Cir. 2010)).

In this case, it is undisputed that Costner listed the real estate upon which the sculptures are located for sale. (Compl. ¶ 36; Answer, ¶ 15). The listing expressly excludes the sculptures and states "they will be relocated by the seller." (Compl. ¶ 37, Answer ¶ 15). Because the real estate listing and intent to relocate the sculptures is undisputed, unambiguous, and in writing, this Court can determine the issue of anticipatory repudiation as a matter of law. *Byre v. City of Chamberlain*, 362 N.W.2d 69, 75 (S.D. 1985) (contractor who placed an announcement in the newspaper informing residents that if they did not enter into a new contract they would not receive garbage services held to have breached its contract with the city by anticipatory repudiation).[4]

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[4] Detmers addressed Costner's argument that he "may" find an agreeable alternate site at some undetermined future time in her response to his Brief in Support of his Motion for Summary Judgment. Those arguments will not be repeated in this brief.

CONCLUSION

Costner's arguments in this case are an exercise in attempting to reconcile what is irreconcilable. Permanent and final cannot mean temporary and transitory. It cannot have been absurd in the prior proceeding to find that the display of the sculptures at Tatanka was temporary, and yet absurd in this proceeding to hold that the display at Tatanka was permanent. Equally contradictory is Costner's assertion that the contract required him to obtain Detmers' agreement to display the sculptures so as to permit him to subsequently move the sculptures whenever and wherever he saw fit.

Costner's arguments concerning his obligations are not grounded in legal principles, but are simply attempts to avoid his obligations. Unfortunately for Costner, the law is not a one way street, and agreements contain a mutuality of obligation. Accordingly, Detmers' Motion for Summary Judgment should be granted.

Respectfully submitted this 15th day of July, 2022.

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

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PEGGY A. DETMERS,

Plaintiff,

v.

KEVIN COSTNER,

Defendant.

40CIV22-000017

PLAINTIFF'S PROPOSED MEMORANDUM AND ORDER

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The Court held a hearing on the parties' cross-motions for summary judgment at the Lawrence County Courthouse on July 22, 2022, at 10:30 a.m. The Plaintiff, Peggy Detmers, was represented by her attorneys, Andrew Damgaard and Russ Janklow. The Defendant, Kevin Costner, was represented by his attorneys, Catherine Seeley and Marty Jackley.

The material facts are undisputed and most of them were the subject of a previous action and appeal. *See Peggy Detmers and Detmers Studios, Inc., v. Kevin Costner and the Dunbar Resort, Inc.* (Civ. 09-60); *Detmers v. Costner*, 2012 S.D. 35, 814 N.W.2d 146. Accordingly, this Court is bound by the factual findings and holdings of the prior action and appeal. *Piper v. Young*, 2019 S.D. 65, ¶ 22, 936 N.W.2d 793, 804; *Am. Family Ins. Grp. v. Robnik*, 2010 S.D. 69, ¶ 15, 787 N.W.2d 768, 774; *Wells v. Wells*, 2005 S.D. 67, ¶ 15, 698 N.W.2d 504, 508.

UNDISPUTED MATERIAL FACTS

A. General Background.

In the early 1990's, Costner desired to build a five-star international resort and casino in Deadwood, South Dakota. *Detmers*, 2012 SD 35, ¶ 1, 814 N.W.2d at 147. The resort, which was to be named "The Dunbar," was intended to be located on property Costner owned north of Deadwood and was intended to include a buffalo sculpture display at the resort's entrance. *Id.* at ¶¶ 1-2. Costner entered into an oral agreement with Detmers, a South Dakota artist, to create the sculptures, which were to consist of three Lakota warriors on horseback pursuing fourteen buffalo at a "buffalo jump," at a scale of 25% larger than life-size. *Id.* at ¶ 2. Detmers began working on the sculptures. *Id.* However, when the Dunbar Resort still had not been built by the late 1990's, Detmers stopped working on the sculptures. *Id.* Subsequently, after several months of negotiations, Detmers and Costner entered into a binding contract dated May 5, 2000, addressing the parties' rights with regard to the sculptures. *Id.* at ¶¶ 3-4. Detmers completed the sculptures, and ultimately they were placed on a property called "Tatanka," which Costner owned and intended for the resort. *Id.* at ¶ 5. Tatanka included a visitor center, gift shop, café, interactive museum, and nature walkways. *Id.*

B. Previous Action and Appeal.

In the previous action, Detmers sued Costner over paragraph 3 of their May 5, 2000 contract, which provides:

> Although I (Costner) do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere, I will give you (Detmers) 50% of the profits from the sale of the one and one-quarter life scale sculptures after I have recouped all my costs incurred in the creation of the sculptures and any such sale. The sale price will be at our above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders).

Detmers claimed that she did not agree to display the sculptures "elsewhere" pursuant to paragraph 3 of the contract, because she did not agree to display the sculptures at Tatanka in the absence of the Dunbar Resort. *Id.* at ¶ 11. In his proposed findings of fact and conclusions of law in the prior action, Costner asserted that the parties "agreed to Tatanka as a permanent site for the sculptures regardless of The Dunbar Resort." (Defendant's Proposed Findings of Fact & Conclusions of Law in CIV. 09-60, PFF ¶ 55). According to Costner, the agreement was that the sculptures were to remain at Tatanka "for all time." (*Id.* at PFF ¶¶ 42 & 58).

The trial court adopted Costner's assertions and found that Tatanka was to be the "final display area for the sculptures" and that the parties agreed to "permanent display of the sculptures at Tatanka" under paragraph 3 of their

contract. (Trial Court's Findings of Fact & Conclusions of Law in Civ. 09-60, CL ¶ 14); *Detmers*, 2012 SD 35, ¶ 10, 814 N.W.2d at 149 ("The circuit court concluded Detmers agreed, as demonstrated by her conduct and actions, to permanent display of the sculptures at Tatanka"). The trial court also found that Costner intended to build the resort and was continuing to try and build it. (Trial Court's Findings of Fact & Conclusions of Law in Civ. 09-60, CL ¶ 9). The South Dakota Supreme Court affirmed the trial court. *Detmers*, 2012 S.D. 35, 814 N.W.2d 146.

C. Post-Appeal.

In the years that followed the prior action and appeal, it is undisputed that Costner never built the Dunbar Resort and sold all of the property he intended for the resort with the exception of the real estate where the sculptures are displayed (i.e., Tatanka). In the fall of 2021, however, Costner listed the Tatanka real estate for sale. The real estate listing expressly excludes the sculptures and states they "will be relocated by seller."

As a result, Detmers brought this action against Costner. Count 1 alleges that the real estate listing constitutes an anticipatory repudiation of the judicially determined agreement to permanently display the sculptures at Tatanka. Count 2 requests a declaratory judgment that Costner's relocation of the sculptures would constitute a breach of the judicially determined agreement to permanently display the sculptures at Tatanka.

ANALYSIS

An anticipatory repudiation or constructive breach occurs when a party unequivocally indicates that he or she will not perform when performance is due. *Union Pacific R.R. v. Certain Underwriters at Lloyds of London*, 2009 S.D. 70, ¶ 39, 771 N.W.2d 611, 621; *Weitzel v. Sioux Valley Heart Partners*, 2006 SD 45, ¶ 31, 714 N.W.2d 884, 894 (additional citations omitted). An anticipatory repudiation allows the non-breaching party to "treat the repudiation as an immediate breach of contract and sue for damages."[1] *Union Pacific R.R.*, 2009 SD 70, ¶ 39, 771 N.W.2d at 621; *Weitzel*, 2006 S.D. 45, ¶ 31, 714 N.W.2d at 894.

Ordinarily, an anticipatory repudiation is a question of fact. 23 Williston on Contracts § 63:45 (4th ed. 2000). However, "[an] exception applies where the repudiation is in writing, and where the terms are unambiguous, in which case a court may resolve the issue of repudiation as a matter of law." *Id.*; *see also DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 112 (2nd Cir. 2010). Because Costner's real estate listing is an unambiguous writing, this Court can determine the issue of anticipatory repudiation as a matter of law. *Byre v. City of Chamberlain*, 362 N.W.2d 69, 75 (S.D. 1985) (Announcement in a newspaper whereby a party indicated its intent not to perform a contractual obligation in the future constituted an anticipatory breach); 23 Williston on Contracts § 63:45 (4th ed.); *see also Rhodes*

[1] In addition to damages, a breach by repudiation "may give rise to other remedies." Restatement (Second) of Contracts § 236 cmt. a (1981).

v. Davis, 628 Fed. Appx. 787, 790 (2d Cir. 2015) (unpublished) ("While the question of anticipatory breach is generally for the jury, where, as here, the relevant communications are in writing and unambiguous, the issue may be decided as a matter of law").

This Court is bound by the findings of the trial court as affirmed by the Supreme Court regarding the parties' agreement to "final" and "permanent" display of the sculptures at Tatanka.[2] Such "permanent" and "final display" imposes an ongoing obligation to display the sculptures at Tatanka, the location determined to be agreed upon by the parties under their contract. Accordingly, Costner's real estate listing and statement concerning relocation of the sculptures from their permanent place of display at Tatanka constitutes a repudiation of the parties' agreement as a matter of law.

Despite the findings of the trial court, as affirmed by the Supreme Court, and Costner's representations in the prior proceedings, Costner now argues that "permanent" should be interpreted as allowing him to unilaterally relocate the sculptures whenever and wherever "he sees fit" or that his agreement to

---

[2] The trial court did not arrive at the permanency of the parties' agreement *sua sponte*. Instead, it was Costner who repeatedly made that assertion in his proposed findings of fact and conclusions of law in the previous action. In his proposed findings, Costner used term "permanent" at least five different times in conjunction with the display of the sculptures at Tatanka. In addition, Costner asserted the agreement was for the sculptures to remain at Tatanka "for all time."

permanently display the sculptures at Tatanka discharged him from any future obligations. However, any assertion by Costner in this action that the agreement to display the sculptures at Tatanka was temporary, discretionary, or already fulfilled is clearly inconsistent with Costner's judicially adopted assertion that the parties' agreement was for permanent display and, if adopted by this Court, would create inconsistent legal determinations. Such a determination would impose an unfair detriment to Detmers, whose agreement to display the sculptures would be found to have been permanent in one action, but temporary in a subsequent action, depending upon what was expedient for Costner. Therefore, Costner is estopped from asserting his agreement with Detmers was temporary or discretionary. *Hayes v. Rosenbaum Signs & Outdoor Adv. Co.*, 2014 S.D. 64, ¶¶ 12-20, 853 N.W.2d 878, 883 (party was judicially estopped from deriving a new position that was contrary to what had previously been judicially adopted).

Secondarily, Costner argues that Detmers' claims are barred by the doctrine of res judicata. Res judicata consists of two preclusion concepts: issue preclusion and claim preclusion. *Piper*, 2019 SD 65, ¶ 22, 936 N.W.2d at 804; *Robnik*, 2010 SD 69, ¶ 15, 787 N.W.2d at 774. Issue preclusion forecloses re-litigation of a matter that has been previously litigated and decided. *Robnik*, 2010 SD 69, ¶ 15, 787 N.W.2d at 774. Claim preclusion, on the other hand, "refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because

of a determination that it should have been advanced in the earlier suit...." *Piper*, 2019 SD 65, ¶ 22, 936 N.W.2d at 804; *Robnik,* 2010 SD 69, ¶ 15, 787 N.W.2d at 774. In determining whether claim preclusion bars a subsequent action, "it is the underlying facts which give rise to the cause of action that must determine the propriety or necessity of presenting a specific issue within the prior proceedings." *Lewton v. McCauley*, 460 N.W.2d 728, 731 (S.D. 1990).

Indeed, "[f]or purposes of res judicata, a cause of action is comprised of the facts which give rise to, or establish, the right a party seeks to enforce." *Nelson v. Hawkeye Sec. Ins. Co.*, 369 N.W.2d 379, 380 (S.D. 1985); *Black Hills Jewelry Mfg. Co. v. Felco Jewel Indus. Inc.*, 336 N.W.2d 153, 157 (S.D. 1983). Four elements must be satisfied in order to apply res judicata: (1) the issue of the prior adjudication must be identical to the present issue, (2) there must have been a final judgment on the merits in the previous case, (3) the parties in the two actions must be the same or in privity, and (4) there must have been a full and fair opportunity to litigate the issues in the prior adjudication. *Dakota, Minnesota & Eastern R.R. Corp. v. Acuity*, 2006 SD 72, ¶ 17, 720 N.W.2d 655, 661; *Staab v. Cameron*, 351 N.W.2d 463, 465 (S.D. 1984).

The issue in the prior case was whether the parties agreeably displayed the sculptures "elsewhere." *Detmers*, 2012 SD 35, ¶ 10, 814 N.W.2d 146, 149. At that time, Tatanka was located on the same property that Costner intended for the

Dunbar Resort, *Detmers*, 2012 S.D. 35, ¶ 5, 814 N.W.2d 146 at 148, and Costner maintained that he still intended to build the resort on that property. (Trial Court's Findings of Fact & Conclusions of Law in Civ. 09-60, FF ¶ 9). Detmers asserted she did not agree to the placement of the sculptures in the ultimate absence of the resort. *Detmers*, 2012 S.D. 35, ¶ 11, 814 N.W.2d at 149. Costner, on the other hand, claimed the agreement was to permanently display the sculptures at Tatanka regardless of whether the resort was built. (Trial Court's Findings of Fact & Conclusions of Law in Civ. 09-60, CL ¶ 9). As a result, the issue of whether Costner could unilaterally move the sculptures *from* Tatanka to some *other location* was not at issue or litigated in the prior action. Thus, the issue preclusion component of res judicata is not implicated in this action.

The claim preclusion component of res judicata is also inapplicable. There is no evidence whatsoever that Detmers or anyone else "knew or should have known" Costner planned to sell all of the real property intended for the resort and relocate the sculptures from Tatanka to some other site. *Dakota, Minnesota & Eastern R.R. Corp.* 2006 SD 72, ¶ 20, 720 N.W.2d at 662 (holding claim preclusion had been met when party "knew or should have known" of the existence of facts in the prior action). Because the prior action dealt with whether Costner and Detmers agreed to permanently display the sculptures *at* Tatanka, even in the ultimate absence of the resort, the issue of whether Costner could unilaterally relocate the sculptures *from*

Tatanka was irrelevant. *Robnik*, 2010 SD 69, ¶ 20, 787 N.W.2d at 775 (claim preclusion did not bar subsequent action where the issue raised would not have been relevant in the prior action). Indeed, the facts giving rise to this action had not occurred until many years after the prior action and appeal had concluded.

Finally, Costner argues that Detmers' action is not ripe until he actually sells the property or relocates the sculptures. The policy underlying anticipatory repudiation, however, is to allow the non-repudiating party to elect to treat the repudiation as a breach, as opposed to waiting for an actual breach to occur. *Union Pacific R.R.*, 2009 SD 70, ¶ 39, 771 N.W.2d at 621; *Weitzel*, 2006 S.D. 45, ¶ 31, 714 N.W.2d at 894. When Detmers elected to treat Costner's repudiation as a breach, her cause of action became ripe for adjudication. *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 632-633 (D.C. Cir. 2017) (*citing Franconia Assocs. v. U.S.*, 536 U.S. 129, 143 (2002) (holding anticipatory breach is a "doctrine of accelerated ripeness" because it gives the plaintiff the option to have the law treat the repudiation as an actual breach).

Detmers' alternative claim for declaratory judgment is also ripe. Requests for declaratory judgments, like claims of anticipatory repudiation, do not require a party to wait until they suffer actual harm. *Kneip v. Herseth*, 214 N.W.2d 93, 96 (S.D. 1974) ("The liberality to be afforded the construction of the Declaratory Judgment Act, because of its remedial goals, should allow, however, the decision of

present rights or status which are based on future events when a good-faith controversy is brought before the courts").

In summary, paragraph 3 of the May 5, 2000 contract required the Dunbar Resort be built within 10 years or the sculptures to be agreeably displayed elsewhere. The trial court in the prior proceeding found that the parties had agreed to the permanent display of the sculptures at Tatanka, and that finding was affirmed by the South Dakota Supreme Court. This Court is bound by that finding and, as a result, can conclude as a matter of law that Costner placing the real estate for sale and stating his intention to relocate the sculptures constitutes a repudiation of the parties' judicially determined agreement. Now, therefore, it is hereby

ORDERED:

(1) That the Plaintiff's Motion for Summary Judgment is granted as to her claims for anticipatory repudiation and declaratory judgment;

(2) That the Defendant's Cross-Motion for Summary Judgment is denied; and

(3) That the parties should attempt in good faith to reach an agreement with regard to the details related to the sale of the sculptures as provided by paragraph 3 of the May 5, 2000 contract, or schedule a hearing with the Court to the extent the parties are unable to reach an agreement.

Dated this __ day of August, 2022.

BY THE COURT:

____
Honorable Eric Strawn
Circuit Court Judge

ATTEST:

______________________________, Clerk
By: ___________________________
Deputy

CERTIFICATE OF SERVICE

I certify that on the 1st day of August, 2022, a copy of the foregoing was electronically filed and served through the Odyssey File and Serve system upon the following individual:

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/s/ Andrew R. Damgaard
One of the Attorneys for Plaintiff

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)SS
COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT

****

PEGGY DETMERS AND DETMERS STUDIOS, INC., Plaintiffs, vs. KEVIN COSTNER AND THE DUNBAR, INC., Defendants.	Civ. 09-60 FINDINGS OF FACT AND CONCLUSIONS OF LAW

****

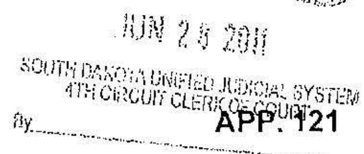
A trial to the Court was held on February 22 and 23, 2011, at the courtroom of the Lawrence County Courthouse, Deadwood. Plaintiffs appeared personally and by counsel, Mr. A. Russell Janklow and Mr. Andrew R. Damgaard, Sioux Falls. Defendants appeared personally and by counsel, Mr. James S. Nelson and Mr. Kyle L. Wiese, Rapid City. The Court having heard the testimony of witnesses and having reviewed the briefs and exhibits, issues the following FINDINGS OF FACT AND CONCLUSIONS OF LAW.

FINDINGS OF FACT:

1. Any Finding of Fact may be deemed to be a Conclusion of Law and any Conclusion of Law may be deemed to be a Finding of Fact.

2. The Court's Memorandum Decision dated 6-28-11, is herein incorporated by this reference.

3. Beginning in the 1990s, Kevin Costner envisioned building a five-star hotel and resort on real property north of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4TH CIRCUIT CLERK OF COURT
By

Deadwood. This resort was to be named after one of his movie characters and called The Dunbar.

4. Costner planned to include sculptures of bison at the entryway to the hotel.

5. Costner commissioned artist Peggy Detmers to build the bison sculptures. The final plans for the sculptures called for 14 bison and 3 Lakota warriors mounted on horseback. The sculptures are 25 percent larger than life scale.

6. The parties agreed that Detmers would be paid $250,000 and would receive royalty rights in fine art reproductions of the sculptures that were to be marketed and sold at the gift shop/gallery at The Dunbar hotel.

7. In the late-1990s and the early part of 2000, Detmers stopped working on the sculptures because The Dunbar had not been built. Detmers and Costner negotiated additional compensation to Detmers in exchange for completion of the sculptures and entered into an express written contract on May 5, 2000. The contract provided an additional payment of $60,000 for Detmers (increasing her total compensation for the sculptures to $310,000), royalty rights on reproductions, and display of the sculptures. This contract is at the center of the parties' current dispute, and paragraph 3 provides:

> Although I do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere, I will give you 50% of the profits from the sale of the

> one and one-quarter life scale sculptures after I have recouped all my costs incurred in the creation of the sculptures and any such sale. The sale price will be at our [sic] above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you the copyright of the sculptures so sold (14 bison, 3 Dakota horse and riders).

8. Because the resort had not been built in the early 2000s, the parties began looking for alternate locations to display the sculptures pursuant to a display requirement in paragraph 4 of the May 5, 2000 agreement. Detmers considered locations in Hill City, while Costner consider locations in and around Deadwood.

9. Ultimately, Costner realized that he could place the sculptures on a portion of the real property he owned and intended for The Dunbar.

10. Costner called Detmers on January 23 or 24, 2002 to let her know that he was considering placing the sculptures at a site on The Dunbar property. At that location, Costner knew he could dedicate a site for the sculptures and provide them with protection, something that several of the temporary locations he considered could not.

11. Detmers received a phone call from Costner on January 23 or 24, 2002.

12. On January 29, 2002, the project's architect, Patrick Wyss, sent a letter to Costner confirming the beginning of the

design process on this project, which came to be known as Tatanka.

13. Wyss was instructed by Costner to keep Detmers informed and involved. Beginning in June 2002, Detmers was influential in the placement of the sculptures on the Tatanka property.

14. In March 2003, the "mock-up" of the sculpture placement began. Numerous photos were admitted into evidence depicting Detmers' involvement in the "mock-up" and final placement of the sculptures.

15. The Court finds that the use of the "mock-ups" was Detmers' idea. Essentially this entailed placing temporary plywood cut-outs of the sculptures where the final sculptures would ultimately be installed. Using these wood "mock-ups," the design could be easily changed and rearranged before the final sculptures had been delivered for placement. Through the use of the "mock-ups" the exact location of each piece could be pinpointed using GPS technology and staking for final placement of each sculpture.

16. Costner ceded many decisions to Detmers because, as the artist, she "had a place of authority" and "heavy influence" regarding sculpture placement.

17. Numerous media articles from 2002 and 2003 quote Detmers as being "excited" and "relieved" about the sculptures

placement at Tatanka. Those same articles characterize Tatanka as a "stand-alone" entity, completely separate from The Dunbar.

18. Tatanka consists of a visitor's center with a gift shop and café, interactive museum, nature walkways, and the sculptures.

19. Costner spent approximately $6,000,000 building this attraction.

20. Tatanka was dedicated and had its public grand opening on June 21, 2003. Both Costner and Detmers spoke at the grand opening.

21. In December 2008, Detmers brought suit against Costner alleging breach of contract. In her prayer for relief she requested specific performance. She alleges that because The Dunbar was not built within ten years and the sculptures are not agreeably displayed elsewhere she is entitled to 50 percent of the proceeds from the sale of the sculptures.

CONCLUSIONS OF LAW:

1. The Court has jurisdiction over the subject matter and personal jurisdiction over the parties.

2. As this Court has previously ruled, the terms of this contract are clear and unambiguous. Memorandum Decision and Order at 5 (December 17, 2010) ("The contract language is not ambiguous."). Said Memorandum Decision is incorporated herein by this reference.

3. When terms are unambiguous, courts construe contract terms using the plain and ordinary meaning of the words. *Kjerstad Realty, Inc. v. Bootjack Ranch, Inc.*, 2009 SD 93, ¶¶ 10-11, 774 NW2d 797, 800-01; *Prudential Kahler Realtors v. Schmitendorf*, 2003 SD 148, ¶¶ 10-11, 673 NW2d 663, 666 ("[T]his Court will apply the 'plain and ordinary meaning' of the disputed term." (other citations omitted)).

4. "Elsewhere," as used in the contract, clearly means at a site other than The Dunbar. This is in accord with the regular meaning of that term. *See* BLACK'S LAW DICTIONARY 468 (5th ed. 1979) (defining elsewhere as "in another place; in any other place"); WEBSTER'S NEW COLLEGIATE DICTIONARY 404 (9th ed. 1986) (defining elsewhere as "in or to another place").

5. Because The Dunbar has not been built, any site is elsewhere, i.e., somewhere other than The Dunbar. The placement of the sculptures at Tatanka is elsewhere. It is "in another place[,]" separate and distinct, from the non-existent Dunbar hotel and resort.

6. In determining whether Costner and Detmers agreed to the sculptures' placement at Tantanka, the conduct of the parties is controlling. *See Weller v. Spring Creek Resort*, 477 NW2d 839, 841 (SD 1991) (recognizing that the existence of an implied contract is determined by the parties conduct); *see also Huffman v. Shevlin*, 72 NW2d 852, 855 (SD 1955) (considering "all

the circumstances surrounding the execution of the writing and the subsequent acts of the parties" when determining the parties' intent).

7. Because the issue in this case, whether the sculptures were agreeably displayed elsewhere, requires the Court to determine if the parties made an agreement beyond that which is necessary to create the May 5, 2000 contract, the law of implied contracts is applicable. The Court must determine whether the parties' words, actions, and non-actions constituted a further agreement, i.e. an implied contract, regarding the placement of the sculptures somewhere other than The Dunbar. *See In re Estate of Regennitter*, 1999 SD 26, ¶ 12, 589 NW2d 920, 924 ("We look to the totality of the parties' conduct to learn whether an implied contract can be found." (other citations omitted)); *Weller*, 477 NW2d at 841.

8. The language of the contract contemplates that The Dunbar may not be built. The contract states, "[a]lthough I do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years . . . ." Therefore, the contract acknowledges the fact that The Dunbar may not be built.

9. Testimony from Costner and others associated with The Dunbar and Tatanka projects indicates that although Costner has been attempting to build The Dunbar for years, and continues to

try to build it, he never promised Detmers or anyone else that it would actually be built.

10. Any reliance by Detmers on a promise or guarantee, from Costner or his associates, that The Dunbar would be built is unreasonable. *See Vander Heide v. Boke Ranch, Inc.*, 2007 SD 69, ¶ 30, 736 NW2d 824, 834 (finding that "alleged reliance was not in any way justified" (citing Werner v. Norwest Bank South Dakota N.A., 499 NW2d 138, 141-42 (SD 1993))); *Garrett v. BankWest, Inc.*, 459 NW2d 833, 848 (SD 1990) (rejecting a promissory estoppel claim because the alleged reliance was unreasonable).

11. Detmers actions following the decision to place the sculptures at Tatanka indicate that she agreed to display them at that location. Detmers was notified of the plan to place the sculptures at Tatanka in January 2002, she was involved as part of the construction team, she had significant involvement in the "mock-up" and placement of the sculptures in early 2003, and she gave a speech at the Tatanka grand opening in June 2003. Detmers documented her involvement in this project by use of her own photographer during the construction of Tatanka.

12. Detmers testified that she never told Costner that she disagreed with the placement of the sculptures at Tatanka:

> Q: . . . I asked you, did you ever personally tell Kevin that you did not want the sculptures at Tatanka?
> A: As I never thought it would be a stand-alone thing, so I never --

> Q: You didn't tell him, did you.
> A: I told him - I kept asking him, "Is the Dunbar going to be here?" and he said, "Yes." I go, "Okay."

Tr. Trans. Vol. 1, 95:7-13 (February 22, 2011). Detmers did not directly answer the question posed by Costner's counsel regarding whether she told him that she didn't want the sculptures at Tatanka, but based on the Court's observation of the witness during cross-examination, the Court finds that she did not make any definitive statement to Costner stating that she did not want the sculptures placed at Tatanka. Furthermore, Costner testified as follows on the same issue:

> Q: So at any time then did Peggy ever just tell you flat out, "I object to [Tatanka]. I don't want to do it. I don't agree"?
> A: No.

Tr. Trans. Vol. 2, 343:21-24 (February 23, 2011).

13. Her significant involvement in the Tatanka project and her failure to tell Costner or anyone else that she did not agree with placement at Tatanka indicate that she was agreeable to the sculptures' placement at Tatanka for the long term.

14. Costner's funding and building of Tatanka is further evidence of an agreeable display. It is unreasonable to think that Costner would expend millions of dollars in creating this attraction if the parties did not agree that this would be the final display area for the sculptures. To conclude that this was a unilateral decision by Costner that was not agreed upon by Detmers would cause an absurd result; namely that Costner would

have spent $6,000,000 to place the sculptures at Tatanka and if The Dunbar was not built, the sculptures be moved someplace else that was agreeable to them both or that the sculptures be sold upon Detmers' demand. This Court cannot endorse such an absurd result. *See Nelson v. Schellpfeffer*, 2003 SD 7, ¶ 8, 656 NW2d 740, 743.

15. Costner has fully performed under the terms of the contract. The words, actions, and inactions of both parties indicate an agreement to the display of the sculptures at Tantanka.

16. Detmers has failed to prove that Coster breached the May 5, 2000 contract.

Therefore, it is hereby ORDERED:

That Detmers' prayer for relief is DENIED.

Counsel for Costner shall prepare a Judgment consistent with the Court's Findings of Fact and Conclusions of Law and Memorandum Decision within 14 days.

Dated this 28th day of June, 2011.

BY THE COURT:

Hon. Randall L. Macy
Circuit Court Judge

FILED
JUN 28 2011
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4TH CIRCUIT CLERK OF COURT
By

ATTEST:
Carol Latuseck
Clerk of Courts
Deputy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a true and correct copy of the FINDINGS OF FACT AND CONCLUSIONS OF LAW in the above entitled matter upon the persons herein next designated all on the date below shown, by depositing a copy thereof in the United States Mail at Deadwood, South Dakota, postage prepaid, in envelopes addressed to said addressees, to-wit:

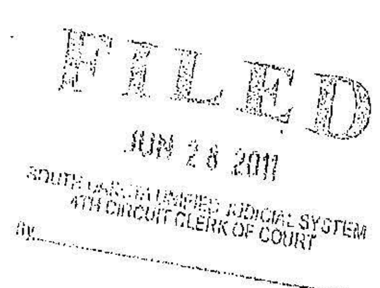
Mr. A. Russell Janklow
Mr. Andrew R. Damgaard
Attorneys at Law
1700 W. Russell Street
Sioux Falls, SD 57104

Mr. James S. Nelson
Mr. Kyle L. Wiese
Attorneys at Law
P.O. Box 8045
Rapid City, SD 57709-8045

which addresses are the last addresses of the addressees known to the subscriber.

Dated this 28th day of June, 2011.

Cindy Gackle
Cindy Gackle
Scheduling Clerk



STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

PEGGY A. DETMERS and DETMERS STUDIOS, INC., a South Dakota corporation, Plaintiffs, vs. KEVIN COSTNER and THE DUNBAR, INC., a South Dakota corporation, Defendants.	)))))))))))))	Civil No. 09-60 **DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The above-entitled action was tried to the Court without a jury in Deadwood, South Dakota, on February 22-23, 2011. Plaintiff Peggy Detmers ("Detmers") appeared in person and through her attorneys, A. Russell Janklow and Andrew R. Damgaard of Janklow Law Firm, Prof. LLC, of Sioux Falls, South Dakota, and Defendant Kevin Costner ("Costner") appeared in person and through his attorneys, James S. Nelson and Kyle L. Wiese of Gunderson, Palmer, Nelson & Ashmore, LLP, of Rapid City, South Dakota.

The Court has examined the record, including the sworn testimony and stipulated exhibits, has reviewed the briefs, and heard oral argument in this matter. After weighing all the evidence, the Court now makes and enters the following findings of fact and conclusions of law. Any conclusion of law may be deemed to be a finding of fact or vice versa and shall be appropriately incorporated into the findings of fact or conclusions of law as the case may be.

FINDINGS OF FACT

1. The parties entered into an agreement on May 5, 2000, regarding 17 bronze buffalo sculptures ("sculptures").

2. The agreement requires the sculptures to be displayed at The Dunbar resort within ten years of the May 5, 2000, contract or to be "agreeably displayed elsewhere." Exhibit 14.

3. The Dunbar was not built within ten years of their contract and has not yet been built at the present time.

4. Both Detmers and Costner reviewed alternate locations for the sculptures in 2001. T.T. Vol. 2 at 315-16; Exhibits 4-6.

5. The only issue at trial is whether the sculptures are "agreeably displayed" at Tatanka pursuant to paragraph 3 of the May 5, 2000, agreement.

6. Detmers' story changed from deposition to trial. T.T. Vol. 1 at 194.

7. Detmers' testimony is not credible or truthful and is afforded less weight than Costner's.

8. Costner's testimony was truthful, credible, and substantiated by the exhibits and testimony of Pat Wyss.

9. Pat Wyss's testimony was truthful and credible.

10. Costner's testimony is consistent with his deposition testimony. T.T. Vol. 2 at 322.

11. While staying at the Deadwood Holiday Inn in January 23 or 24, 2002, Costner telephoned Detmers and discussed with her the concept for displaying the sculptures on the Dunbar property, the site now known as Tatanka. T.T. Vol. 2 at 315-21, 347; T.T. Vol. 1 at 97, 120.

12. During that January 2002 telephone call, Detmers and Costner agreed to permanently display the sculptures on the Dunbar property as a stand-alone, independent attraction. T.T. Vol. 2 at 315-21, 347; T.T. Vol. 1 at 97, 120.

13. During this telephone call, Detmers "agreed to have [her] sculptures at the Dunbar" and that she "knew about the project and that the buffalo [were] going to go up on the Dunbar property." T.T. Vol. 1 at 120; *see id.* at 97 (Detmers testified that during the January 23 or 24, 2002, telephone conversation, it was the Dunbar property location that was discussed.).

14. On the same day Detmers agreed to the placement at Tatanka, Costner contacted Pat Wyss seeking an estimate and telling Wyss to ensure Detmers be involved in project. T.T. Vol. 1 at 197, 200-01; T.T. Vol. 2 at 320, 325; Exhibit 25.

15. Pat Wyss confirmed that Costner spoke with Detmers on January 23 or 24, 2002, regarding the concept of Tatanka. T.T. Vol. 1 at 197.

16. Pat Wyss kept Detmers involved in the process as directed by Costner. T.T. Vol. 1 at 179, 208-10.

17. Wyss and Costner had an "open-door policy," and Detmers could be involved "as much as she wanted." T.T. Vol. 1 at 179, 208-10.

18. On January 29, 2002, Pat Wyss forwarded a Tatanka site proposal to Costner. Exhibit 25.

19. During February 5-6, 2002, before Costner gave authorization to proceed with Tatanka, Pat Wyss was in contact with Detmers at least twice. Exhibit 20, 21; T.T. Vol. 1 at 208-209.

20. During February 5-6, 2002, and before receiving authorization to proceed, Pat Wyss discussed the concept of Tatanka with Detmers over the phone and Detmers stopped by to see the drawings. Exhibits 20, 21; T.T. Vol. 1 at 178, 201-02.

21. Detmers verified she had contact with Pat Wyss. T.T. Vol. 1 at 114-17; T.T. Vol. 1 at 178, 201-02; Exhibits 20, 21.

22. Detmers was aware of the concept for Tatanka and agreed to it in January 2002, before Costner gave Wyss authority to proceed on February 18, 2002. T.T. Vol. 1 at 114-17; T.T. Vol. 1 at 178, 201-02; Exhibits 20, 21.

23. In February 2002, Pat Wyss included Detmers Studio in the Project Directory for Tatanka. Exhibit 19; T.T. Vol. 1 at 212.

24. On March 27, 2002, Costner sought Detmers' advice in rearranging the sculptures at Tatanka by telling Pat Wyss to talk with Detmers. Exhibit 27, 30; T.T. Vol. 2 at 211.

25. Costner, Wyss, and Detmers had "lots of meetings" together about Tatanka. T.T. Vol. 1 at 218-19.

26. Wyss and Detmers had a cordial relationship. *Id.* at 207.

27. Detmers was "excited" about Tatanka and was relieved when she saw what was planned. Exhibit 32 (*Rapid City Journal* on April 23, 2002).

28. Detmers thought Tatanka was "very impressive." Exhibit 37 (*People* magazine article).

29. The newspapers and magazine articles published from January 2002 through August 2003 substantiated Costner's testimony that Tatanka is a permanent, stand-alone site for the sculptures and has "taken on a life of its own." Exhibit 38 (June 21, 2002, *Black Hills Pioneer*); Exhibit 44 (*Rapid City Journal*, March 8, 2003); Exhibit 73 (June 18, 2002, *Black Hills Pioneer*).

30. On June 26, 2002, Detmers requested and received a conference call regarding Tatanka. Exhibit 35; T.T. Vol. 1 at 215.

31. On June 28, 2002, Detmers faxed Pat Wyss and directed the placement of the sculptures at Tatanka. Exhibit 39; T.T. Vol. 1 at 218.

32. In July 2002, Detmers was provided updated conceptual models of Tatanka when they were completed. Exhibit 36; T.T. Vol. 1 at 125.

33. Costner and Detmers placed egg-carton mockups of the sculptures at the Tatanka site which was a significant, added expense further substantiating that Tatanka was an "agreeable" location for permanent display of the sculptures under paragraph 3 of the May 5, 2000, agreement. T.T. Vol. 2 at 334

34. In January or February 2003, Detmers and Costner spent two to three days placing the egg-carton mockups at Tatanka. T.T. Vol. 1 at 132-33.

35. Costner and Detmers "mutually" placed the mockups and sculptures at Tatanka. Exhibit 39; T.T. Vol. 1 at 135; 126-27 (Detmers directed where the mockups would go).

36. Costner and Detmers placed the sculptures at Tatanka for approximately seven days in March 2003. Exhibits 52-57, 61; T.T. Vol. 1 at 205; T.T. Vol. 1 at 137-39.

37. Costner and Wyss "ultimately followed" Detmers' advice and relied on her when deciding how to place the sculptures on the cliff. T.T. Vol. 1 at 112.

38. The sculptures are placed at Tatanka as Detmers wanted. T.T. Vol. 1 at 125.

39. Detmers' drawings and models were used to place the sculptures at Tatanka. Exhibit 31, 33, 34, and 63; T.T. Vol. 1 at 98-99, 124, 144, 214.

40. Detmers was "making decisions" at Tatanka and had influence in the concept and design of Tatanka and the sculptures placement there. T.T. Vol. 1 at 123; T.T. Vol. 2 at 332.

41. Detmers was "glad to be a part of Tatanka." Defendants' Exhibit C.

42. Costner was never certain that The Dunbar resort would exist and believed that the sculptures would be at Tatanka "for all time." Exhibit 78.

43. Costner and Detmers documented Tatanka: Story of The Bison by taking pictures and making a video to commemorate and document the creation of Tatanka. Exhibit 79.

44. Detmers hired a photographer to take pictures at Tatanka, and the pictures were placed on Detmers' website as a way to market her work. T.T. Vol. 1 at 131-32.

45. Detmers knew in 1996 that The Dunbar "wasn't going to happen." T.T. Vol. 1 at 83.

46. Detmers was not guaranteed The Dunbar resort would be built and she knew The Dunbar may not be built. *Id.* at 80-82.

47. Costner did not guarantee The Dunbar would be built. T.T. Vol. 2, at 279.

48. Wyss confirmed The Dunbar resort was never guaranteed and that Detmers was never told The Dunbar would be built. T.T. Vol. 1 at 199.

49. Detmers knew Costner had been trying, unsuccessfully, to build The Dunbar resort for over ten years. T.T. Vol. 2, at 276.

50. Detmers was not "kept out of the loop" and was an active participant in Tatanka.

51. Detmers knew of and agreed to Tatanka in January 2002.

52. Detmers and Costner "agreeably displayed" the sculptures pursuant to paragraph 3 of the May 5, 2000, agreement. Exhibit 14.

53. The sculptures current location is "elsewhere" pursuant to paragraph 3 of the May 5, 2000, agreement.

54. Costner could have temporarily located the sculptures in Deadwood for no cost. T.T. Vol. 2 at 317:22

55. Detmers agreed to Tatanka as a permanent site for the sculptures regardless of The Dunbar resort.

56. Detmers never told Costner she did not want the sculptures at Tatanka. T.T. Vol. 1 at 94-95; T.T. Vol. 2 at 343.

57. The newspaper articles, magazine articles, and opening ceremony speeches confirm that The Dunbar was never guaranteed and that Tatanka was a stand-alone, permanent site for the sculptures.

58. The sculptures were to be at Tatanka "for all time." Exhibit 78.

59. Any purported reliance by Detmers that The Dunbar would be built was not justifiable.

60. Costner spent approximately six million dollars to create Tatanka.

61. Costner owns all the buffalo sculptures. Exhibit 14.

62. Detmers and Costner supported the placement of the sculptures at the Tatanka site in the news media.

63. Both parties actively and agreeably participated in the opening ceremonies, by doing interviews and giving speeches, among other things. Exhibit 78; Defendants' Exhibit C.

64. Plaintiff received more than $310,000 for her work on the sculptures. T.T. Vol. 1 at 79.

65. In accordance with paragraph 3 of the May 5, 2000, agreement, the sculptures are "agreeably displayed" at the Tatanka site.

CONCLUSIONS OF LAW

1. The language of the May 5, 2000, agreement between the parties is not ambiguous.

2. The intent of the parties can be determined by the plain language used within the four corners of the contract..

3. The preponderance of the evidence shows that Detmers and Costner expressly agreed that the sculptures are "agreeably displayed" at the Tatanka location pursuant to paragraph 3 of the May 5, 2000, agreement, and Detmers conduct confirms this agreement.

4. Detmers, through her exhibited conduct, manifested assent that the sculptures are "agreeably displayed" at Tatanka pursuant to paragraph 3 of the May 5, 2000, agreement.

5. Through Detmers' exhibited conduct and manifested assent, Detmers and Costner had an implied in fact agreement that the sculpture are "agreeably displayed elsewhere" at Tatanka.

6. The Tatanka is a separate entity that owns 85 acres of land. T.T. Vol. 2 at 249; *see* Exhibit 37, 44 (noting Tatanka would be a separate entity and stand-alone site).

7. Tatanka site is "elsewhere" under the May 5, 2000, agreement.

8. Detmers and Costner's agreement to place the sculptures at Tatanka was not contingent on The Dunbar resort.

9. The Dunbar resort was never guaranteed to be completed.

10. Tatanka is "elsewhere" under the May 5, 2000, agreement.

11. Costner justifiably relied on Detmers' express agreement and her conduct, both indicating that the sculptures are "agreeably displayed" at Tatanka.

12. Estoppel is a complete defense to Detmers' action.

13. The terms of the contract have been satisfied and Costner remains the owner of all interests in the sculptures, including but not limited to copyrights, and he is not required to sell his sculptures.

14. Pursuant to paragraph 3 of the May 5, 2000, agreement, Detmers and Costner agreeably displayed the sculptures at Tatanka.

15. Detmers has failed to meet her burden.

16. Even if Detmers has not acquiesced or otherwise agreed to display the sculptures at Tatanka, the May 5, 2000, contract does not mandate or provide that Defendants must sell the sculptures.

Dated this ________ day of ____________________________, 2011.

BY THE COURT:

____

Randall L. Macy
Circuit Court Judge

ATTEST:

____

Clerk of Courts

(SEAL)

CERTIFICATE OF SERVICE

I certify that on April 21, 2011, I caused to be sent U.S. mail, first-class postage prepaid, a true and correct copy of Defendants' Proposed Findings of Fact and Conclusions of Law to:

Andrew R. Damgaard
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Sioux Falls, SD 57104

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By ______________________
James S. Nelson
P.O. Box 8045
Rapid City, SD 57709-8045

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

40CIV22-000017

PEGGY A. DETMERS,

Plaintiff,

v.

KEVIN COSTNER,

Defendant.

PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

Pursuant to SDCL ¶ 15-6-56, the Plaintiff submits the following Statement of Undisputed Material Facts in support of her Motion for Summary Judgment:

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. In the early 1990's, Kevin Costner desired to build a five-star international resort and casino in Deadwood, South Dakota. (Compl. ¶ 4; Answer, ¶ 3).

2. The resort was to be named "The Dunbar" after one of Costner's movie characters. (6/28/2011 FF & CL, p. 2, ¶ 3).

3. The resort would be located on property Costner owned north of Deadwood and include sculptures of buffalo displayed at the resort's entrance. (*Id.* at pp. 1-2, ¶¶ 3-4; *Detmers v. Costner*, 2012 S.D. 35, ¶ 2, 814 N.W.2d 146, 147; Compl. ¶ 5; Answer, ¶ 3).

{04728215.1}

4. Costner and South Dakota artist Peggy Detmers ("Detmers") orally agreed that Detmers would create the sculptures (collectively the "monument"). (6/28/2011 FF & CL, p. 2, ¶5; *Detmers*, 2012 S.D. 35 at ¶ 2, 814 N.W.2d at 147; Compl. ¶ 6; Answer, ¶ 3).

5. The monument was to consist of 17 buffalo and Lakota warrior sculptures. (6/28/2011 FF & CL, p. 2, ¶5; *Detmers*, 2012 S.D. 35 at ¶ 2, 814 N.W.2d at 147; Compl. ¶ 5; Answer, ¶ 3).

6. The sculptures were to be 25% larger than life-size and the overall monument was to depict three Lakota warriors on horseback pursuing 14 buffalo at a "buffalo jump." (*Detmers*, 2012 S.D. 35 at ¶ 2; 814 N.W.2d at 147).

7. As part of her compensation, Detmers was to receive royalty rights in reproductions marketed and sold at the resort. (*Id.*).

8. Detmers began working on the sculptures in the spring of 1994. (Compl. ¶ 8; Answer, ¶ 5).

9. However, by the late 1990's, the resort had not been built. (6/28/2011 FF & CL, p. 2, ¶ 7; *Detmers*, 2012 SD 35 at ¶ 2; 814 N.W.2d at 147; Compl. ¶ 9; Answer, ¶ 5).

10. As a result, Detmers stopped working on the sculptures. (*Id.*).

11. After several months of negotiations, Costner and Detmers entered into a binding contract. (*Detmers*, 2012 SD 35 at ¶ 3; 814 N.W.2d at 147-148).

12. The contract provided Detmers additional compensation, clarified her royalty rights on reproductions, and provided her with certain rights regarding display of the sculptures. (*Id.*).

13. Paragraph 4 of the contract required the sculptures be publicly displayed at a suitable site if the resort was not under construction within three years. (Aff. of Counsel Ex. B, ¶ 4).

14. Paragraph 3 of the contract provides as follows:

> Although I [Costner] do not anticipate this will ever arise, if the Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere, I will give you [Detmers] 50% of the profits from the sale of the one and one-quarter life scale sculptures after I have recouped all of my costs incurred in the creation of the sculptures and any such sale. The sale price will be at or above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders).

Id. at ¶ 3.

15. Three years passed and the Dunbar still was not under construction. (6/28/2011 FF & CL, p. 3, ¶ 8; *Detmers*, 2012 S.D. 35 at ¶ 4, 814 N.W.2d at 148).

16. As a result, Costner and Detmers began looking for alternative/interim locations pursuant to the public display requirement in paragraph 4 of the contract. (*Id.*).

17. Detmers considered locations in Hill City while Costner considered locations in and around Deadwood. (6/28/2011 FF & CL, p. 3, ¶ 8).

18. Ultimately, the sculptures were placed on property Costner owned and intended for the resort. (*Id.* at p. 3, ¶ 9; *Detmers*, 2012 S.D. 35 at ¶ 5, 814 N.W.2d at 148).

19. As the artist, Detmers "had a place of authority" and a "heavy influence" regarding the display of the sculptures. (6/28/2011 FF & CL, p. 4, ¶ 16; *Detmers*, 2012 S.D. 35 at¶ 5, 814 N.W.2d at 148).

20. The monument display was called "Tatanka" and it included a visitor center, gift shop, café, interactive museum, and nature walkways. (*Id.*).

21. In 2008, Detmers brought an action against Costner alleging that the resort had not been built and she did not agree to the placement of the sculptures at Tatanka in the absence of the resort. (*Id.* at ¶ 6, 814 N.W.2d at 148; 6/28/2011 FF & CL, p. 5, ¶ 21).

22. Specifically, Detmers alleged that the sculptures were not "agreeably displayed elsewhere" pursuant to paragraph 3 of the agreement because she had been promised the resort would still be built on the same property as Tatanka. (*Detmers*, 2012 S.D. 35 at ¶¶ 10-11, 814 N.W.2d at 149).

23. According to Detmers, she never thought Tatanka would be a "stand alone thing" in the absence of a resort. (6/28/2011 FF & CL, p. 8, ¶ 12).

24. The trial court ruled for Costner. (6/28/2011 FF & CL, p. 10, ¶ 15).

25. Specifically, the trial court ruled that Tatanka was "elsewhere" pursuant to paragraph 3 of the contract. (*Id.* at p. 6, ¶ 5).

26. The trial court found that Costner still intended to build the resort. (*Id.* at p. 7, ¶ 9; p. 8, ¶ 10).

27. The trial court also found that Detmers and Costner agreed to the placement of the monument "at Tatanka for the long term." (*Id.* at p. 9, ¶ 13).

28. On appeal, the South Dakota Supreme Court affirmed the trial court. (*Detmers*, 2012 S.D. 35, 814 N.W.2d 146).

29. The Court held that the nature of Costner and Detmers' agreement was a factual inquiry and that the trial court did not commit clear error in finding that Costner and Detmers agreed "to permanent display of the sculptures at Tatanka." (*Id.* at ¶¶ 9-10, 814 N.W.2d at 149).

30. The Court also affirmed the trial court's determinations that Tatanka was "elsewhere" pursuant to paragraph 3 of the contract and that Costner was continuing to try and build the resort. (*Id.* at ¶¶ 13 & 18, 814 N.W.2d at 149-151).

31. In the ten years that have followed the South Dakota Supreme Court's decision in *Detmers*, Costner has sold his restaurant and casino in Deadwood. (Complaint, ¶ 34; Answer ¶ 14).

32. Costner has also sold all of the property that surrounds Tatanka that had been intended for the resort. (Complaint, ¶ 35; Answer ¶ 14; Aff. of Counsel, Ex. C, p. 7, Response to RFA No. 5).

33. In the fall of 2021, Costner listed the real estate upon which Tatanka is located for sale. (Complaint, ¶ 36; Answer, ¶ 15).

34. The listing expressly excludes the sculptures and states they "will be relocated by seller." (Complaint, ¶ 37, Answer, ¶ 15).

35. Costner intends to relocate the sculptures and has been in discussions to relocate them to Hot Springs, Arkansas. (Aff. of Counsel, Ex. C, p. 7, Response to RFA Nos. 1 & 6).

36. Costner did not inform Detmers of his intent to sell Tatanka and relocate the sculptures. (*Id.* at p. 7, Response to RFA No. 2).

Dated this 17th day of May, 2022.

WOODS, FULLER, SHULTZ & SMITH, PC

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CERTIFICATE OF SERVICE

I certify that on the 17th day of May, 2022, a copy of the foregoing was electronically filed and served through the Odyssey File and Serve system upon the following individual:

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/s/ Andrew R. Damgaard
Andrew R. Damgaard

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

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	:	40CIV22-000017
PEGGY A. DETMERS,		
Plaintiff,	:	**PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**
v.	:	
KEVIN COSTNER,	:	
Defendant.	:	

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

The Plaintiff, through her undersigned attorney, responds as follows to the Defendant's Statement of Undisputed Material Facts:

1. Plaintiff does not dispute paragraphs 1-10, 12-17, and 20-28 of the Defendant's Statement of Undisputed Material Facts.

2. With respect to paragraph 11, the Plaintiff disputes that Tatanka was selected pursuant to paragraph 4 of the contract or that it was "an alternative site." Instead, the trial court found that Tatanka was selected as the permanent site for the sculptures pursuant to paragraph 3 of the contract and that finding was affirmed on appeal. (Damgaard Aff. Ex. A, pp. 9-10, CL # 13 & 14); *Detmers v. Costner*, 2012 SD 35, ¶ 10, 814 N.W.2d 146, 149.

3. Plaintiff does not dispute paragraphs 18 through 19, but disputes that they are material to this Motion.

4. Plaintiff incorporates the Statement of Undisputed Facts she submitted in support of her Motion into this response, including but not limited to, the trial court's findings that the parties agreed to permanently display the sculptures at Tatanka pursuant to paragraph 3 of the contract. (Damgaard Aff. Ex. A, pp. 9-10, CL # 13 & 14); *Detmers v. Costner*, 2012 SD 35, ¶ 10, 814 N.W.2d 146, 149.

Respectfully submitted this 11th day of July, 2022.

WOODS, FULLER, SHULTZ & SMITH, PC

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CERTIFICATE OF SERVICE

I certify that on the 11th day of July, 2022, a copy of the foregoing was electronically filed and served through the Odyssey File and Serve system upon the following individual:

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One of the Attorneys for Plaintiff

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

****

PEGGY DETMERS AND DETMERS STUDIOS, INC.,	)	Civ. 09-60
Plaintiffs,	)	
vs.	)	MEMORANDUM DECISION AND ORDER
KEVIN COSTNER AND THE DUNBAR, INC.,	)	
Defendants.	)	

****

This matter comes before the Court on Defendants' Motion for Use of Parol Evidence and Plaintiffs' Motion for Partial Summary Judgment. A hearing was held on November 17, 2010, at the courtroom of the Lawrence County Courthouse, Deadwood. Peggy Detmers appeared personally and by counsel, Andrew R. Damgaard, Sioux Falls. Kevin Costner and The Dunbar, Inc. appeared by counsel, James S. Nelson and Kyle L. Wiese, Rapid City. The Court having heard the argument of counsel, reviewed the briefs, and being so advised, issues the following MEMORANDUM DECISION AND ORDER.

FACTS

Kevin Costner and Peggy Detmers entered into a contractual relationship on May 5, 2000. Under the contract, Ms. Detmers was to provide sculptures for display at The Dunbar Resort that

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4TH CIRCUIT CLERK OF COURT
By

APPLICABLE LAW

Contract interpretation is a question of law. Kjerstad Realty, Inc. v. Bootjack Ranch, Inc., 2009 SD 93, ¶ 5, 774 NW2d 797, 799. Courts will not "create a forced construction or new contract for the parties when the language is clear . . . ." Cole v. Wellmark of South Dakota, Inc., 2009 SD 108, ¶ 14, 776 NW2d 240, 246. Rather, the "plain and ordinary meaning" of the language used in the contract controls. Id. When possible, the intent of the parties is determined by an analysis of the four corners of the contract. Kernelburner, LLC v. MitchHart Mfg., Inc., 2009 SD 33, ¶ 7, 765 NW2d 740, 742 (other citations omitted).

However, when the language of a contract is ambiguous, parol evidence can be admitted to determine the parties' intent. In re J.D.M.C., 2007 SD 97, ¶ 30, 739 NW2d 796, 806; see SDCL 53-8-5. The determination of contractual ambiguity is also a question of law. Canyon Lake Park, LLC v. Loftus Dental, P.C., 2005 SD 82, ¶ 18, 700 NW2d 729, 734. A contract is ambiguous when it "is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement." Kernelburner, 2009 SD 33, ¶ 7, 765 NW2d at 742 (other citations omitted).

ANALYSIS

This matter comes before the Court because of the parties' disagreement with regard to the interpretation paragraphs 3 and 4 of the contract between Costner and Detmers. Disagreement between parties, on its own, does not create an ambiguity. Divich v. Divich, 2002 SD 24, ¶ 10, 640 NW2d 758, 761 (other citations omitted). "Rather, a contract is ambiguous only when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement." Id. Paragraph 3 provides for the sale of the sculptures as a contingency upon the non-occurrence of two events. First, The Dunbar is not built within 10 years. Second, the sculptures are not agreeably displayed elsewhere. Paragraph 4 provided for the display of the sculptures and royalty agreement if construction had not begun on The Dunbar within three years. The placement of the sculptures was to be by the agreement of the parties, but if an agreement could not be reached, Mr. Costner reserved the right to make a unilateral decision as to placement.

This Court holds that the language of the May 5, 2000 contract between the parties is not ambiguous as a matter of law. The intent of the parties can be determined by the plain language used within the four corners of the document. See

Cole, 2009 SD 108, ¶ 14, 776 NW2d at 246; Kernelburner, 2009 SD 33, ¶ 7, 765 NW2d at 742.

Reading these paragraphs together, as part of the entire contract, the intent of the parties is clear. Nelson v. Schellpfeffer, 2003 SD 7, ¶ 8, 656 NW2d 740, 734. Paragraph 4 provided Costner with the right to make a final decision as to sculpture placement from years three through ten if The Dunbar was not being built or completed. Paragraph 3 requires the sculptures to be displayed at a location that is agreeable to both parties if The Dunbar was not built within ten years. The plain language of the contract provides the intent of the parties without a "forced construction" of contractual language Cole, 2009 SD 108, ¶ 14, 776 NW2d at 246.

CONCLUSION

The contract language is not ambiguous. Kernelburner, 2009 SD 33, ¶ 7, 10, 765 NW2d at 742-43. Because there is no ambiguity, presentation of parol evidence is unnecessary. Johnson v. Cross, 2003 SD 86, ¶ 21, 667 NW2d 701, 708 ("[P]arol evidence cannot be used to show the substance of the parties' agreement absent an ambiguity.").

Therefore, it is hereby ORDERED:

1. Defendants' Motion for Use of Parol Evidence is DENIED;

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a true and correct copy of the MEMORANDUM DECISION AND ORDER in the above entitled matter upon the persons herein next designated all on the date below shown, by depositing a copy thereof in the United States Mail at Deadwood, South Dakota, postage prepaid, in envelopes addressed to said addressees, to-wit:

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Mr. James S. Nelson and Mr. Kyle L. Wiese
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which addresses are the last addresses of the addressees known to the subscriber.

Dated this 17th day of December, 2010.

Cindy Gackle
Cindy Gackle
Scheduling Clerk

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4TH CIRCUIT CLERK OF COURT
By________

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30117

PEGGY A. DETMERS,

Plaintiff/Appellant,

v.

KEVIN COSTNER,

Defendant/Appellee.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE ERIC STRAWN
Circuit Court Judge

APPELLEE'S BRIEF

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The notice of appeal was filed on the 9th day of September, 2022.

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JURISDICTIONAL STATEMENT

The Honorable Eric Strawn of the Fourth Judicial Circuit signed a Memorandum Decision and Order granting Defendant Kevin Costner's Motion for Summary Judgment and granting in part and denying in part Plaintiff Peggy Detmers's Motion for Summary Judgment on August 31, 2022. A Notice of Entry of Order was filed on September 2, 2022, and Plaintiff filed a Notice of Appeal with the Lawrence County Clerk of Court on September 9, 2022. This matter is now properly before this Court for consideration pursuant to SDCL 15-26A-1 as an appeal from a final judgment.

STATEMENT OF THE LEGAL ISSUES

The following issues are involved in this matter:

(1) Whether Plaintiff Detmers's claims are barred by the doctrine of res judicata.

The circuit court correctly determined that they are. Plaintiff raises issues in this proceeding which were decided on the merits a prior action. She seeks to determine her continuing rights under the terms of a contract, when a prior court has already determined that the contract has been fully performed.

Detmers v. Costner, 2012 S.D. 35, 814 N.W.2d 146
People ex rel. L.S., 2006 S.D. 76, 721 N.W.2d 83
Healy Ranch, Inc. v. Healy, 2022 S.D. 43, 978 N.W.2d 786
Estate of Johnson ex rel. Johnson v. Weber, 2017 S.D. 36, 898 N.W.2d 718

(2) Whether the parties have any continuing rights and obligations under paragraph three of their May 5, 2000 contract.

The circuit court correctly determined that Costner has no further obligations under paragraph three of the parties' contract as he fully performed under that provision. Paragraph three grants Detmers no continuing or lasting rights, and Costner therefore has no obligation to seek her approval before exercising his rights as the sole owner of the subject property.

Detmers v. Costner, 2012 S.D. 35, 814 N.W.2d 146
Nygaard v. Sioux Valley Hosps. & Health Sys., 2007 S.D. 37, 731 N.W.2d 184
Icehouse, Inc. v. Geissler, 2001 S.D. 134, 636 N.W.2d 459
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(3) Whether the word "permanent" has any place in the interpretation of the parties' contract and, if so, whether it should be given its plain and ordinary meaning.

The circuit court correctly determined that "permanent" does not mean eternal or perpetual. Furthermore, the parties' contract does not call for a "permanent" agreement or arrangement, but their actions only suggest that they intended their final arrangement to endure for the significant amount of time.

Detmers v. Costner, 2012 S.D. 35, 814 N.W.2d 146
Nygaard v. Sioux Valley Hosps. & Health Sys., 2007 S.D. 37, 731 N.W.2d 184

(4) Whether either party anticipatorily breached their contract.

The circuit court correctly found that Detmers anticipatorily breached the parties contract when she unequivocally indicated she would refuse to seek agreement under the contract. Based on Detmers's first in time breach, Costner was relieved of all future performance obligations under that provision.

Nygaard v. Sioux Valley Hosps. & Health Sys., 2007 S.D. 37, 731 N.W.2d 184
FB&I Bldg. Prod., Inc. v. Superior Truss & Components, a Div. of Banks Lumber, Inc., 2007 S.D. 13, 727 N.w.2d 474.
Union Pac. R.R., 2009 S.D. 70, 771 N.W.2d 611

STATEMENT OF THE CASE

The Honorable Eric Strawn, Circuit Court Judge for the Fourth Judicial Circuit heard argument on Kevin Costner's and Peggy Detmers's cross motions for summary judgment on their contract dispute. After considering the undisputed material facts, Judge Strawn granted Costner's motion and denied Detmers's request for relief.

Kevin Costner and Peggy Detmers negotiated and entered into a binding contract for the creation of seventeen sculptures to be placed at a five-star resort. When the resort was not built the parties agreed to display the sculptures at a stand-alone site known as Tatanka. After a number of years passed, Detmers brought suit against Costner alleging that she no longer agreed to display the sculptures she created at Tatanka. The parties litigated their respective rights and obligations under their contract, and ultimately, the

trial court held that Costner had fully performed his obligations under the terms of the contract. This Court affirmed the trial courts judgment for Costner.

Now, ten years after these parties last appeared before this Court together, Detmers has again initiated a law suit against Costner, alleging that he breached certain duties under the terms of that same contract. The circuit court in the current matter properly reviewed the findings from the earlier trial court and this Court's decision on appeal and agreed with those decisions that Costner had fully performed his obligations under the contract thereby discharging any further obligations thereunder.

As Judge Strawn properly considered the undisputed facts and applied the plain language of the parties' contract, this Court should affirm Judge Strawn's memorandum decision and order granting Costner summary judgment and declaring Detmers's lack of continuing rights under the parties' contract.

STATEMENT OF THE FACTS

The facts pertinent to this case can be split into three distinct time frames: pre-2008 litigation, 2008 litigation through 2012 appeal, and the post-2012 appeal.

Pre-2008 Litigation

In the early 1990s, Kevin Costner (Costner) sought to construct a five-star resort on real property he owned near Deadwood, South Dakota. R. 89, R. 176. The resort was to be called The Dunbar, and Costner envisioned having a set of sculptures displayed on the resort complex. R. 89, R. 176. To achieve that vision, Costner commissioned Peggy Detmers (Detmers) to create seventeen sculptures depicting three Lakota warriors on horseback pursuing fourteen buffalo at a "buffalo jump." R. 167. When construction had not begun on The Dunbar by the late 1990s, Detmers had concerns about the project, and

thereafter Costner and Detmers negotiated and entered into a binding written contract for the completion of the artwork. R. 89, R. 176, R. 168.

The parties' contract, dated May 5, 2000, consisted of five concise paragraphs and set forth the parties' distinct negotiated interests in the sculptures and their reproductions. R. 65-66; App. 1-2. In short, the contract contained provisions relating to Detmers's compensation, Costner's sole ownership of the sculptures, the split of proceeds from sales of sculpture reproductions, marketing considerations, and the parties' respective roles in determining the initial placement of the sculptures. R. 65-66.

The current action implicates only the second, third, and fourth paragraphs of the parties' contract. Paragraph two of the parties' contract clearly articulates Costner's ownership rights in the sculptures and provides Detmers a continuing interest in proceeds from sales of the sculptures' reproductions. R. 65. That provision unequivocally states that Costner "will be the sole owner of all rights in the sculptures, including the copyright." R. 65. Even though Costner was to be the sole owner of the sculptures under the contract, the parties negotiated a term that would allow Detmers to "always be attached" to the sculptures "through her royalty participation." R. 65.

Paragraphs three and four of the contract both address the display of the sculptures in certain circumstances. R. 65. In paragraph three of the negotiated contract, the parties contemplated that The Dunbar may not be built and set forth how the contract could be satisfied in such situation. R. 65. Paragraph three provides in full:

> Although I [(Costner)] do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere, I will give you [(Detmers)] 50% of the profits from the sale of the one and one-quarter life scale sculptures after I have recouped all my costs incurred in the creation of the

> sculptures and any such sale. The sale price will be at [or] above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders).

R. 65. Paragraph four of the contract also addresses the display of the sculptures and recognizes Costner's greater rights in the sculptures by providing him final decision-making authority in certain circumstances. R. 66; App. 2. Paragraph four provides:

> We will locate a suitable site for displaying the sculptures if The Dunbar is not under construction within three (3) years after the last sculpture has been delivered to the mold makers. In the meantime, until the sculptures are put on display, I [(Costner)] will permit you [(Detmers)] to market and sell reproductions and you can retain eighty percent 80% of the gross retail sales prices and pay 20% to me. Once the sculptures are put on public display in public view, agreed upon by both parties (but with the final decision to be made by me if we do not agree); the percentages will reverse, 80% of the gross retail sales price to me and 20% to you. The marketing must proceed as outlined below.

R. 66; App. 2.

The Dunbar had not been built, nor was it under construction, by the early 2000s, so Costner located and proposed to Detmers an alternative site at which to display the sculptures. R. 91, R. 176, *Detmers v. Costner*, 2012 S.D. 35, ¶ 5, 814 N.W.2d 146, 148. Detmers agreed to the proposal and assisted with the placement of the sculptures at that site. R. 91, R. 176, *Detmers*, 2012 S.D. 35, ¶ 11, 814 N.W.2d at 149. To accompany the display, Costner erected several amenities at the location, including a visitor center, gift shop, café, interactive museum, and nature walkways. R. 91, R. 176, *Detmers*, 2012 S.D. 35, ¶ 5, 814 N.W.2d at148. The sculptures, together with the other amenities have

become known as Tatanka. R. 91, R. 176. The sculptures have remained at Tatanka since their initial placement.

2008 Litigation through 2012 Appeal

In 2008, Detmers brought suit against Costner alleging that he breached their May 5, 2000 contract. Detmers based her 2008 suit on the premise that the sculptures had not been agreeably displayed elsewhere pursuant to paragraph three of the contract. *See Detmers*, 2012 S.D. 25, ¶ 6, 814 N.W.2d at 148. In her 2008 Verified Complaint and Demand for Jury Trial, originally filed in Pennington County file Civ. 08-2354, Detmers unequivocally asserted that "Detmers has not agreed to and will not agree to an alternative permanent location for the monument." R. 249. Costner denied Detmers's allegations and for four years, the parties engaged in litigation related to the terms of their contract. R. 91, R. 176.

Paragraph three took a central role in the parties' prior litigation. Due to the significance of the contract's language, the parties litigated whether the terms of the May 5, 2000 contract were ambiguous and whether parol evidence should be admitted to supplement the contract's express terms. R. 92, R. 176. While Costner argued that the terms of the May 5, 2000 contract were susceptible to more than one meaning, Detmers took the position that the contract was unambiguous and argued against the admission of parol evidence. R. 92, R. 176. The trial court accepted Detmers's position and held that the contract was unambiguous, thereby denying Costner's request to present extrinsic evidence. R. 92, R. 176, *Detmers*, 2012 S.D. 25, ¶ 7, 814 N.W.2d at 148-49. That decision was not appealed. R. 92, R. 176, *Detmers*, 2012 S.D. 25, ¶ 17, 814 N.W.2d at 150.

Following the circuit court's ruling on the unambiguity of the contract, the parties conducted a two-day court trial which resulted in a final judgment for Costner. R. 63, R. 92, R. 176. The circuit court found that, despite Detmers's contentions to the contrary, Detmers agreed to the placement of the sculptures at Tatanka "for the long term" and that Tatanka constituted "elsewhere" under the terms of the contract. R. 59-61. Accordingly, the circuit court specifically held that "Costner ha[d] fully performed under the terms of the contract." R. 63, R. 92, R. 176; R. 21; App. 12.

Detmers appealed the circuit court's decision to the South Dakota Supreme Court. *Detmers*, 2012 S.D. 25, 814 N.W.2d 146. The parties fully litigated the appeal, paying particular attention to the terms of the contract and their meanings. *Id.* In Detmers's appeal, she argued that paragraph three of the contract, which required agreeable placement of the sculptures within ten years, had not been satisfied because she only agreed to the placement of the sculptures at Tatanka until 2010, ten years after the parties entered their contract. R. 122. In her reply brief, Detmers correctly noted that "[t]he contract calls for an agreement with respect to location, not duration." R. 122. Ultimately, the South Dakota Supreme Court affirmed the circuit court's decision, holding that the circuit court did not err when it determined that the sculptures were displayed elsewhere at Tatanka pursuant to paragraph three of the contract. *Detmers*, 2012 S.D. 25, ¶ 21, 814 N.W.2d at 151.

Post-2012 Appeal

Since this Court's 2012 opinion in *Detmers*, the sculptures have remained displayed at Tatanka. Recently, a real estate listing for the land upon which Tatanka sits has been posted. R. 92, R. 176. The real estate listing, states, "Tatanka statutes are not

included—will be relocated by seller." R. 29. After becoming aware of the real estate listing, Detmers again brought suit against Costner alleging breach of contract and alternatively seeking a declaratory judgment. R. 3-9.

Detmers and Costner filed cross motions for summary judgment on Detmers's claims. R. 39, R. 87. The Honorable Judge Eric Strawn of the Fourth Judicial Circuit heard oral argument on the parties' cross motions, and on August 31, 2022, issued a Memorandum Decision and Order granting Costner's motion for summary judgment, denying Detmers's motion for summary judgment on her breach of contract claim, and granting Detmers's motion for summary judgment on her declaratory judgment claim, finding that Detmers has no continuing contractual rights or interest in the placement of the sculptures. Detmers now appeals the circuit court's decision.

STANDARD OF REVIEW

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." SDCL 15-6-56(c). When reviewing a circuit court's grant or denial of summary judgment, this Court

> must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists.

Saathoff v. Kuhlman, 2009 S.D. 17, ¶ 11, 763 N.W.2d 800, 804 (quotation omitted). This Court's "task on appeal is to determine only whether a genuine issue of material fact

exists and whether the law was correctly applied." *Id.* "If there exists any basis which supports the ruling of the trial court, affirmance of summary judgment is proper." *Id.*

ARGUMENT

I. The circuit court properly concluded that Detmers's current claims are precluded by res judicata as the parties' rights under the applicable contract provisions were litigated and determined in the prior action.

Before reaching the merits of either party's Motion for Summary Judgment, the circuit court considered whether Detmers should be allowed to pursue her current claims based on the doctrine of res judicata. R. 251-53. After reviewing Detmers's current claims in light of the final holdings in the prior litigation, the circuit court properly determined that Detmers is precluded from bringing her current action on principles of res judicata. R. 251-53. Detmers now challenges the lower court's application of res judicata to her case. A circuit court's ruling on the issue of res judicata is reviewed de novo. *People ex rel. L.S.*, 2006 S.D. 76, ¶ 21, 721 N.W.2d 83, 89 (citing *Wells v. Wells*, 2005 S.D. 67, ¶ 11, 698 N.W.2d 504, 507).

"The doctrine of res judicata is premised on two maxims: a person should not be twice vexed for the same cause and it is for the public good that there be an end to litigation." *Id.* at ¶ 23 (cleaned up and quotation omitted). "Res judicata consists of two preclusion concepts: issue preclusion and claim preclusion." *Healy Ranch, Inc. v. Healy*, 2022 S.D. 43, ¶ 40, 978 N.W.2d 786, 798; *Estate of Johnson ex rel. Johnson v. Weber*, 2017 S.D. 36, ¶ 41, 898 N.W.2d 718, 733 (quotation omitted). Issue preclusion, sometimes referred to as collateral estoppel, "foreclose[es] relitigation of a matter that has been litigated and decided." *Estate of Johnson.* 2017 S.D. 36, ¶ 41, 898 N.W.2d 718, 733 (quotation omitted). Claim preclusion on the other hand is broader than issue

preclusion and forecloses litigation of a matter never before litigated because it should have been brought in an earlier suit. *Id.*

In order for a court to apply the preclusive effects of res judicata, four elements must be present:

> (1) a final judgment on the merits in an earlier action; (2) the question decided in the former action is the same as the one decided in the present action; (3) the parties are the same; and (4) there was a full and fair opportunity to litigate the issues in the prior proceeding.

People ex rel. L.S., 2006 S.D. 76, ¶ 22, 721 N.W.2d 83, 89-90 (citation omitted).

A foundational principle of res judicata is that it "seeks to promote judicial efficiency by preventing repetitive litigation over the same dispute." *Id.* ¶ 23. (citation omitted). Accordingly, "[i]n examining whether these elements are present, a court should construe the doctrine liberally, unrestricted by technicalities." *Id.* ¶ 22.

Detmers concedes that there has been a final judgment on the merits in a previous case and that the parties in the two actions are the same. Accordingly, whether res judicata should be applied to preclude Detmers's current action depends on whether the question to be decided here is the same as that which was decided in the prior action and whether there was a full and fair opportunity to litigate the current issue in the prior proceeding. The circuit court correctly answered both of those questions in the affirmative.

A. The prior court determined the parties' rights and obligations under paragraph three of their May 5, 2000 contract by holding that Costner fully performed his obligation.

The prior action involved the parties both seeking declaratory judgments relative to their rights and obligations under the May 5, 2000 contract, particularly as it related to

paragraph three of the contract. The prior trial court and this Court on appeal framed the principal inquiry at trial as whether the sculptures had been agreeably displayed elsewhere pursuant to paragraph three of the contract; thus, the determinative issue was whether the parties had properly and fully performed under the express terms of that provision. Accordingly, the issue of whether the parties had completed their performance obligation under paragraph three was the ultimate issue which was litigated by the parties, ruled upon by the trial court, and affirmed by this Court on appeal. R. 63; App. 12 ("Costner has fully performed under the terms of the contract."); *Detmers v. Costner*, 2012 S.D. 35, 814 N.W.2d 146.

Even though the principal inquiry of the prior trial may have been Detmers's agreeableness and the definition of "elsewhere," the nature of the declaratory judgment claim and counterclaim shows that the parties sought a broader articulation of their respective rights and obligations under the contract. Throughout the course of the litigation, the parties briefed and argued additional issues which would allow the trial court to fully determine the parties' respective interests as articulated in the contract. Importantly, the prior trial court considered the terms of paragraph three in light of the whole contract in order to determine whether or not the contract was ambiguous. The trial court ruled that it was unambiguous and that its terms should be given the meaning that they express. That decision was fully and fairly litigated by the parties,[1] was the

[1] In fact, in the prior proceedings Detmers argued to the trial court that the terms of the parties' May 5, 2000 contract were unambiguous and the trial court accepted her position. *See* Memorandum Decision and Order dated December 17, 2010, filed in *Detmers v. Costner*, 40CIV09-60; Plaintiffs' Brief in Support of Motion for Partial Summary Judgment and in Opposition to Defendant's Motion for Use of Parol Evidence dated November 5, 2010, filed in *Detmers v. Costner*, 40CIV09-60. To the extent she now

subject of a trial court order, and was not appealed. That decision should not be relitigated here; yet, that is exactly what Detmers now tries to do by suggesting the provision contains additional terms, rights, and obligations.

Just as the ambiguity issue that the trial court ruled upon was inextricably entwined with the court's narrowed issues, so too was the court's ruling that Costner fully performed under paragraph three of the contract. While the trial court in the prior proceeding addressed whether the sculptures had been agreeably displayed elsewhere at Tatanka, that was the only inquiry necessary to determine whether the parties had fully performed their obligations under paragraph three. A conclusion that the parties had performed their respective obligations would constitute a declaration of the rights and discharge them from any further performance under the contract provision.[2] Accordingly, the parties litigated the issue on the merits, and the trial court ruled that Costner had "fully performed" his obligations under the terms of the contract. This Court ultimately affirmed that court's order.

Because the larger scope of the parties' prior litigation was for the purpose of determining the parties' performance under paragraph three of their May 5, 2000 contract and the parties' rights and obligations under that provision, the issues in the prior litigation are the same as those currently before this Court, and this element of res judicata is met.

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seeks to argue that the contract is ambiguous in an effort to add or modify the contract's express language, she should be judicially estopped from raising such an argument.

[2] While it is true that a party may bring multiple declaratory judgment actions seeking a determination of different rights and obligations under the same instrument, the subject of this action is the same as Detmer's prior declaratory judgment action as that prior action conclusively determined Costner owed her no continuing obligations as he had fully performed under the contract. *Cf. Carver v. Heikkila*, 465 N.W.2d 183 (1991).

B. The parties had a full and fair opportunity to litigate their performance obligations in the prior litigation.

Throughout the prior proceeding, the parties had ample opportunity to litigate their respective performance and rights under the express terms of the May 5, 2000 contract. The parties conducted discovery, submitted briefing, and ultimately proceeded to a trial on the merits to fully litigate whether the terms of paragraph three had been wholly satisfied by the parties. While the circuit court had narrowed the issues to whether Detmers agreed to the placement of Costner's sculptures and whether Tatanka constituted "elsewhere," such argument embodied and was inextricably entwined with whether Costner had fully performed under the terms of the paragraph three. When a cause of action brought in a subsequent action is necessarily encompassed by a court's judgment in a prior proceeding, res judicata should preclude any relitigation of that issue. *See Dakota, Minnesota & Eastern Railroad Corp. v. Acuity*, 2006 S.D. 72, ¶¶ 23-24, 720 N.W.2d 655, 662-63 (noting that when a cause of action is not "swallowed" by the judgment in a prior suit, claim preclusion will not prevent the subsequent action). Because the trial court determined that Costner had fully performed under the contract, Detmers had no continuing right to be involved in the subsequent placement of the sculptures, and Costner may therefore unilaterally relocate the sculptures at his will consistent with his sole ownership rights.

Due to the extremely connected nature of the questions posed in the prior case and their effect on the parties' overall rights and obligations, the parties did fully and fairly litigate whether Costner completely performed his obligations under paragraph three of the contract, thereby discharging any further obligation under that provision. Farnsworth on Contracts § 8.8 at 534 (4th ed., 2004) ("If a duty is fully performed, it is discharged.");

see McGuire v. J. Neils Lumber Co, 97 Minn. 293, 298, 107 N.W. 130, 132 (1906) ("Performance is, as the term implies, such a thorough fulfillment of a duty as puts an end to obligations by leaving nothing more to be done."). Accordingly, this element of res judicata is met, and Detmers is precluded from relitigating whether Costner has any remaining obligations under paragraph three of the contract.

C. Events occurring subsequent to the 2012 appeal do not alter or enhance Detmers's rights under the May 5, 2000 contract and do not give rise to a cause of action.

While Detmers attempts to argue that circumstances have changed since the parties' 2012 appeal, the parties' rights and obligations under the contract which were litigated and decided in the prior action have not changed. Under paragraph three of the May 5, 2000 contract, the sculptures must have been "agreeably displayed elsewhere" within ten years of the parties' contract. The trial court determined, and this Court affirmed, that Costner's sculptures had been displayed pursuant to those terms. Accordingly, the "agreeably displayed elsewhere" provision of the contract has been satisfied and no further obligation under that paragraph exists because Costner has fully performed his duty thereunder. Costner continues to have "sole ownership" and decision-making authority pursuant to paragraph two of the contract, and Detmers has no continuing rights or input in the subsequent display of the sculptures.

II. Even if res judicata does not bar Detmers's lawsuite,, the circuit court properly determined that the sculptures need not remain at Tatanka eternally.

A. "Permanent" means permanent.

Despite the trial court's previous conclusion that Costner had fully performed under the contract, Detmers attempts to undermine that holding and this Court's

affirmance by drawing on this Court's use of the word "permanent" to describe the sculptures' display at Tatanka." *Detmers*, 2012 S.D. 35, ¶ 10, 814 N.W.2d 146, 149. Specifically, Detmers latches onto this Court's language in *Detmers I* that "Detmers agreed, as demonstrated by her conduct and actions, to permanent display of the sculptures at Tatanka. *See id.* However, the *Detmers I* conclusion that Detmers agreed to that placement display does not eliminate Costner's unequivocal ownership of the sculptures or bind Costner to that display in perpetuity. Regardless, Detmers urged the circuit court and now urges this Court to adopt a definition of "permanent" that is out of context with the *Detmers I* decision as a whole and in a manner at odds with its plain meaning.

In its Findings of Fact and Conclusions of Law, the *Detmers I* trial court concluded that the parties considered Tatanka as the "final display area for the sculptures" under the contract and that Detmers agreed to the sculptures' placement at Tatanka "for the long term." R. 62. In the *Detmers I* opinion, this Court referenced the circuit court's holding as Detmers agreeing to the "permanent display of the sculptures at Tatanka."[3] *Detmers*, 2012 S.D. 35, ¶ 10, 814 N.W.2d 146, 149.

While the term "permanent" is used to describe the lasting display (as opposed to "temporary"), "permanent" does not mean eternal, perpetual, or infinite as Detmers

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[3] While Detmers makes much of the word "permanent," it is important to note that the word "permanent" does not appear in the parties May 5, 2000 contract. R. 65-66; App. 1-2. In fact, as Detmers pointed out in her own Reply Brief to this Court in the prior action, the contract "calls for an agreement with respect to location, not duration." R. 122. As discussed in herein, because the plain language of the contract does not require the sculptures to be agreeably displayed for any set period of time or for an infinite duration, Costner has discharged his obligation to display them agreeably and may now exercise his sole ownership interest to place them as he sees fit.

suggests. The circuit court below looked to the Merriam-Webster dictionary for the plain meaning of "permanent," and supplemented it with the definition found in Merriam-Webster Kids dictionary. The definitions relied upon by the circuit court defined "permanent" as "continuing or enduring without fundamental or marked change," and "lasting or meant to last for a long time: not temporary." PERMANENT, Merriam-Webster, available at https://www.merriam-webster.com/dictionary/permanent (last accessed August 11, 2022). Detmers takes issue with these definitions and proffers her own dictionary definitions for this Court's consideration in her opening brief.

Detmers's proffered definitions of "permanent" do not materially differ from those relied upon by the circuit court in that none establish or even imply an eternal time frame. Detmers's opening brief first provides a definition of "permanent" from the Oxford English Dictionary, which defines the term as "continuing or designed to continue indefinitely without change." Appellant's Brief at 15 (citing *Permanent*, The Compact Oxford English Dictionary 574 (2d ed. 1991)). Her opening brief goes on to provide several similar definitions; the definitions are quite similar in that most of them referenced an "indefinite" time period. Detmers's reliance on these definitions to argue that Costner's sculptures must remain at Tatanka eternally misapplies the plain meaning of "permanent" as defined. Important in considering the true meaning of "permanent" is the definition of the term "indefinite" which repeatedly qualifies the term "permanent" in Detmers's definitions. "Indefinite" is defined as "for a period of time with no fixed end," "not precise; having no exact limits," or "without any limit of time or number." INDEFINTELY, Cambridge Dictionary, available at https://dictionary.cambridge.org/us/dictionary/english/indefinitely (last accessed Nov. 21, 2022); INDEFINITE, Merriam-

Webster, available at https://www.merriam-webster.com/dictionary/indefinitely (last accessed Nov. 21, 2022); INDEFINITELY, Dictionary.com, available at https://www.dictionary.com/browse/indefinitely (last accessed Nov. 21, 2022).

Invoking Detmers's own proffered definitions of "permanent," the parties agreed to display the sculptures at Tatanka for a period of time with no fixed end date. This position comports with the terms of the May 5, 2000 contract which contained no provision requiring the parties to display the sculptures for a given time period and comports with the *Detmers I*'s holding that Costner had fully performed under the contract by agreeably displaying the sculptures at Tatanka within ten years of the parties' contract. When the parties agreed to the sculptures' placement at Tatanka, neither had an indication when the sculptures may be moved from the site. Thus, they agreed to place them there for an indefinite time.

In addition to the dictionary definition of "permanent," which suggests the possibility of change at an uncertain time, the use of the term "permanent" in phrases of legal importance also suggests the term's malleability. For example, "permanent alimony" which is defined in Black's Law Dictionary as "[a]limony payable in [usually] weekly or monthly installments either *indefinitely* or until a time specified by court order." PERMANENT ALIMONY, Black's Law Dictionary (11th ed. 2019). The definition of "permanent injunction" even explicitly recognizes that permanent does not mean eternal; its definition reads "[a]n injunction granted after a final hearing on the merits. Despite its name, a permanent injunction *does not necessarily last forever*." INJUNCTION, Black's Law Dictionary, (11th ed. 2019). *See also* PERMANENT EMPLOYMENT, Black's Law Dictionary, (11th ed. 2019) ("Work that, under a

contract is to continue *indefinitely until either party wishes to terminate* it for some legitimate reason."); PERMANENT DISABILITY, Black's Law Dictionary, (11th ed. 2019) (relating an indefinite, not eternal duration); PERMANENT INJURY, Black's Law Dictionary, (11th ed. 2019) (referring to an indefinite, not eternal period); PERMANENT LAW, Black's Law Dictionary, (11th ed. 2019) ("A statute that continues in force for an indefinite time."); PERMANENT TREATY, Black's Law Dictionary, (11th ed. 2019) (relating a treaty that contemplates but does not ensure ongoing performance).

When the Supreme Court referenced the parties' agreement to the sculptures' "permanent display" at Tatanka, the parties had intended it to remain there indefinitely—that is, without a fixed end period, but that does not mean Costner forfeited his ownership rights to relocate the sculpture in the future. Accordingly, Detmers may not rely on a strained reading of the Supreme Court's use of the term "permanent" to create a new and eternal obligation on Costner as it relates to the parties' contract. The circuit court properly rejected such an argument, and this Court should affirm that decision.

B. Costner is not judicially estopped from arguing the proper definition of "permanent" applies.

Detmers argues that Costner is judicially estopped from urging this Court to apply the proper definition of "permanent" consistent with its own usage. Detmers argues that Costner must agree that "permanent" means "for all time" based on a speech Costner gave at Tatanka's grand opening and based on two proposed findings of fact and conclusions of law Costner offered in the *Detmers I*. Her argument fails for two reasons: (1) it was this Court's use of the term "permanent" upon which Detmers bases

her current claim, and (2) neither the lower court nor this Court on appeal accepted the notion that the sculptures would be placed at Tatanka "for all time."

"Judicial estoppel is an equitable doctrine, founded upon fairness and an institutional concern with using judicial proceedings for improper purposes." *Healy Ranch Partnership v. Mines*, 2022 S.D. 44, ¶ 53, 978 N.W.2d 768, 782 (2022). In order to apply the preclusive effects of judicial estoppel, (1) the party against whom it is sought must have advanced a position clearly inconsistent with an earlier position; (2) the earlier position had been judicially accepted thus creating a risk of inconsistent legal determinations; (3) the party taking the inconsistent position would receive an unfair advantage or cause an unfair detriment to the opponent if not estopped. *Id.* ¶ 55; *Hayes v. Rosenbaum Signs & Outdoor Advertising, Inc.*, 2014 S.D. 64, ¶ 15, 853 N.W.2d 878, 883.

Detmers bases her claim that the sculptures cannot be moved from Tatanka without her consent on this Court's use of the phase "permanent display of the sculptures at Tatanka" in *Detmers I*. Under Detmers theory, this statement created a binding obligation on Costner to either keep his sculptures at Tatanka for all time or seek Detmers's consent into eternity any time he wishes to relocate them. Yet in this Court's use of the term "permanent," it did not reference an eternal placement of the sculptures in its prior opinion.

As it relates to the elements of judicial estoppel, elements two and three cannot be satisfied to apply the doctrine. Detmers argues that Costner argued to the *Detmers I* trial court that "permanent" meant "for all time." She cites to two proposed findings of

fact Costner submitted which included this phrase.[4] However, in its final Findings of Fact and Conclusions of Law, the *Detmers I* trial court references Detmers's agreement to place the sculptures at Tatanka "for the long term," and not "for all time." Clearly then, the trial court did not accept Costner's position relating to the definition of "permanent." Because the trial court did not accept the position that "permanent" meant "for all time," no party would receive an unfair advantage or be unfairly harmed by the application of the term's plain meaning. Rather, the term should simply be applied as it was originally meant to be.

It makes sense that the prior trial court would not accept a position that the sculptures were to remain at Tatanka "for all time." The trial court likely realized that burdening both Costner's real property and personal property for eternity would be an absurd and untenable result, inconsistent with both the party's agreement and with general legal principles of property ownership.[5]

III. The circuit court properly found that Costner was entitled to judgment as a matter of law on Detmers's breach of contract claim.

A. The circuit court did not err in determining Costner was discharged from any obligations under paragraph three of the parties' contract.

Detmers attempts to argue that Costner waived the affirmative defense of discharge, accord, or satisfaction by failing to plead such defense in his answer. However, Detmers failed to raise that issue before the circuit court, and therefore, she has

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[4] It is of note that the proposed findings that Detmers points to cite only to a speech Costner made at Tatanka's grand opening ceremony, and not to any trial testimony regarding the parties' agreement. R. 215-17. It stands to reason then that the trial court may not accept such a proposal as a definitive statement relating to the parties' ultimate agreement which was to place the sculptures at Tatanka for the long term.

[5] "Conditions restraining alienation, when repugnant to the interest created, are void." SDCL 43-3-5.

waived such an argument on appeal. *See State v. Gard*, 2007 S.D. 117, ¶ 15, 742 N.W.2d 257, 261 ("Ordinarily an issue not raised before the trial court will not be reviewed at the appellate level.") (quotation omitted).

B. The plain language of the parties' May 5, 2000 contract confirms that Detmers has no continuing right in the placement of the sculptures.

The circuit court also properly found that Costner is entitled to summary judgment on the merits of Detmers's breach of contract claim. "Contract interpretation is a question of law reviewed de novo." *Detmers*, 2012 S.D. 35, ¶ 20, 814 N.W.2d at 151 (cleaned up and quotation omitted). Courts interpret contracts by looking to the language used by the parties to determine their intention. *Id.* "In order to ascertain the terms and conditions of a contract, [this Court is to] examine the contract as a whole and give words their plain and ordinary meaning." *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 37, ¶ 13, 731 N.W.2d 184, 191 (cleaned up and citation omitted). "When the words of a contract are clear and explicit and lead to no absurd consequences, the search for the parties' common intent is at an end." *Detmers*, 2012 S.D. 35, ¶ 20, 814 N.W.2d at 151.

Beyond considering the plain language of the contract's terms, "[a] contract is to be examined as a whole and all provisions read together to construe the contract's meaning." *City of Watertown v. Dakota, Minnesota & Eastern R. Co.*, 1996 S.D. 82, ¶ 18, 551 N.W.2d 571, 575. "A contract is to be examined and read in its entirety with all provisions being read together to construe its meaning." *Friesz ex re. Friesz v. Farm & City Ins. Co.*, 2000 S.D. 152, ¶ 10, 619 N.W.2d 677, 680. When one provision of a contract does not provide sufficient context on an issue, it is appropriate to look to other provisions within the same contract to give meaning to its terms. *See Kimball Investment Land, Ltd. v. Chmela*, 2000 S.D. 6, 604 N.W.2d 289 (2000) (looking to different

paragraphs in a contract to understand provisions discussed in other paragraphs of the same contract).

A court "may neither rewrite the parties' contract nor add to its language." *Culhane v. W. Nat. Mut. Ins. Co.*, 2005 S.D. 97, ¶ 27, 704 N.W.2d 287, 297 (quotation omitted). This is particularly true when the parties know how to contract for certain considerations yet choose not to do so. This Court has previously considered a scenario in which two contracting parties evidenced through the express terms of their contract a knowledge of how to make certain distinctions relating to costs. *Icehouse, Inc. v. Geissler*, 2001 S.D. 134, ¶ 13, 636 N.W.2d 459, 464. This Court noted that the parties made a distinction in another agreement and that "[i]f the parties had intended to make [such a] distinction, they could have done so." *Id.* Thus, it is up to the contracting parties alone to set forth their rights and obligations in their contracts, and neither party may rely on the courts to save them from what they later perceive to be imprudent contracting decision.

Detmers's and Costner's contract contains only five short paragraphs concisely setting forth their varying rights and obligations. The circuit court properly found that the parties' intent and obligations can be ascertained by looking to the language used in those paragraphs. A simple reading of the contract makes clear that some provisions in the contract carry continuing obligations while others have contingent or dischargeable duties.

The most pertinent paragraph relative to this appeal contains a dischargeable duty on Costner's part. Paragraph three states in part that "if The Dunbar is not built within ten (10) years *or the sculptures are not agreeably displayed elsewhere*, I [(Costner)] will

give you [(Detmers)] 50% of the profits from the sale of the one and one-quarter life scale sculptures… [and] I will assign back to you the copyright of the sculptures." R. 65; App. 1 (emphasis added). Based on this language, paragraph three can be satisfied in one of two ways: (1) The Dunbar is built within ten years after the May 5, 2000 contract or (2) the sculptures are agreeably displayed elsewhere within that time frame. As the trial court properly found in the prior litigation, the sculptures had been agreeably displayed elsewhere at Tatanka within that ten-year time frame, and they have remained there for many years since. Accordingly, Costner affirmatively satisfied his duty under paragraph three, and no further duty thereunder exists.

A fair reading of the plain language of the contract as a whole indicates that the parties understood and intended that the "agreeably displayed elsewhere" language did not constitute a continuing right or obligation. This is particularly evident when reading the provisions surrounding paragraph three as they establish that Detmers has only limited input on the sculptures' display. Paragraph two of the May 5, 2000 contract is evidence that the parties knew how to provide for continuing rights and responsibilities within the express language of the contract. The provision sets forth that Costner is "the sole owner of all rights in the sculptures, including the copyright," and that Detmers would "always be attached through [her] royalty participation." R. 65. If the parties intended for Detmers to have continuing input on the placement of the sculptures in perpetuity, they could have drafted the language accordingly, but they did not draft it in such a manner, and this Court should not read in such an expansive and unwieldy provision. *Icehouse, Inc.*, 2001 S.D. 134, ¶ 13, 636 N.W.2d at 464.

The plain and unambiguous language used by the parties evidences their clear intent that once the sculptures are agreeably displayed elsewhere within ten years of their contract, Costner's obligations under paragraph three of the May 5, 2000 contract were satisfied, and he was relieved from any further performance under that obligation. As the prior trial court and this Court found in the earlier action, Costner has fully performed under paragraph three, his obligations thereunder are discharged, and there exists no basis for Detmers's current action. Accordingly, the circuit court properly granted Costner summary judgment on the issue.

C. The implied contract the Detmers I court found in the prior proceedings only related to the performance of the parties' May 5, 2000 contract and did not create additional contractual rights.

After the *Detmers 1* trial court determined that the contract was unambiguous, it nonetheless had to look outside of the contract—not to modify, amend or clarify the terms of the contract—but simply to determine whether the obligations set forth in paragraph three of the contract had been satisfied. R. 60. When looking beyond the four corners of the contract, the trial court confined its inquiry to whether the parties reached a subsequent agreement to place the sculptures at Tatanka.[6] R. 60-62. In its analysis and conclusions of law, the trial court restricted its analysis to the issue necessary to determine whether paragraph three of the contract had been satisfied—and found the parties agreed to the placement of the sculptures at Tatanka for the long term. R. 62. Despite the limited finding relating to an implied contract, Detmers now attempts to

[6] The trial court explained that "[b]ecause the issue in the case, whether the sculptures were agreeably displayed elsewhere, requires the Court to determine if the parties made an agreement beyond that which is necessary to create the May 5, 2000 contract, the law of implied contracts is applicable." R. 60.

argue that an implied contract was created which substantially amended the parties' express written contract and granted her perpetual rights in the placement of Costner's sculptures. Such an argument goes far beyond the parties' negotiated agreement and the *Detmers I* trial court's express conclusions.

The existence and terms of an implied contract are established by the parties' conduct. *Setliff v. Akins*, 2000 S.D. 124, ¶ 12, 616 N.W.2d 878, 885 (quoting SDCL 53-1-3). Courts "look to the totality of the parties' conduct to learn whether an implied contract can be found." *Id.* at ¶ 13 (quotation omitted). "[T]he pertinent inquiry is whether the facts and circumstances properly evaluated permit an inference that services were rendered in expectance by one of receiving and the other of making compensation." *Id.* (quotation omitted).

Upon making its inquiry into the terms of the parties' implied contract, the *Detmers I* trial court properly found that based on their actions and representations, Detmers and Costner agreed to display the sculptures at Tatanka for the long term. R. 62. The trial court based these conclusions on the evidence that Detmers has significant involvement in the Tatanka project, and that Costner constructed several amenities to accompany the sculptures. R. 62. The undisputed facts in this matter support only those terms of an implied contract, and nothing more.

To the extent that Detmers argues additional terms of an implied contract exist, such arguments are not supported by the record,[7] and Detmers improperly asks this Court

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[7] It is of note that Detmers's current claim alleges a breach of the May 5, 2000 contract and seeks a declaratory judgment on her rights under the that same contract. To the extent that she alleges a breach of some other implied contract, there are significant questions about the efficacy of her current claim, particularly as to whether she has any entitlement to her requested relief.

to consider Detmer's actions prior to the parties' implied contract to determine that contract's terms. If this Court believes additional terms of the implied contract existed, summary judgment would be improper, as significant genuine issues of material fact exist as to the content and extent of those terms. If this Court finds additional terms to the parties' implied contract, it should remand to the circuit court for further proceedings.

D. Detmers committed an anticipatory repudiation of the May 5, 2000 contract when she submitted her Verified Complaint in 2008 which unequivocally expressed that she "has not and will not agree to an alternative permanent location for the monument."

"The general rule is that every contract contains an implied covenant of good faith and fair dealing." *Table Steaks v. First Premier Bank, N.A.* 2002 S.D. 105, ¶ 16, 650 N.W.2d 829, 834 (citation omitted). The implied covenant of good faith and fair dealing "prohibits either contracting party from preventing or injuring the other party's right to receive the agreed benefits of the contract." *Nygaard v. Sioux Valley Hospitals & Health System*, 2007 S.D. 34, ¶ 20, 731 N.W.2d 184, 193. When a contracting party is denied the benefits of its bargain by the other party's lack of good faith, the aggrieved party may sustain a breach of contract claim even though the conduct failed to violate any express terms of the parties' contract. *Id.* at ¶ 21 (quoting *Garrett v. BankWest, Inc.* 459 N.W.2d 833, 841 (S.D. 1990)). "[T]he duty emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Id.* (quotation omitted). "It is well established that a material breach of a contract excuses the non-breaching party from further performance." *FB & I Bldg. Prod., Inc. v. Superior Truss & Components, a Div. of Banks Lumber, Inc.*, 2007 S.D. 13, ¶ 15, 727 N.W.2d 474, 478.

Detmers's Verified Complaint and Demand for Jury Trial originally filed in Pennington County file Civ. 08-2354, unequivocally states that Detmers "has not agreed

and *will not agree to an alternative permanent location for the monument*," (emphasis added). When an anticipatory repudiation based on a party's unequivocal indication that she will not perform when performance is due, the aggrieved party may treat such repudiation as an immediate breach. *Union Pac. R.R.*, 2009 S.D. 70, ¶ 39, 771 N.W.2d 611, 621-22. When the repudiation is in writing and its terms are unambiguous, a court may resolve the issue of repudiation as a matter of law. *DiFolco v. MSNBC Cable, LLC*, 622 F.3d 104, 112 (2d Cir. 2010).

Detmers's Verified Complaint and Demand for Jury Trial unequivocally set forth Detmers's intent not to perform her obligation of good faith and fair dealing in the event the sculptures were ever moved from Tatanka. While the trial court determined that Detmers had agreed to the placement of the sculptures at Tatanka for the long term, Detmers's signed, verified statement nonetheless indicated that she will never agree to another alternative placement. Thus, her anticipatory repudiation constituted a material breach of Costner's justified expectations that the parties would at least attempt some sort of agreement on placement. Accordingly, Detmers's breach relieved Costner from further performance under that provision of their contract and he was not required to seek her agreement if he sought to relocate the sculptures.

IV. Even if this Court finds Detmers has some continuing rights relative to the subsequent placement of the sculptures, the real estate listing does not constitute an anticipatory repudiation and her claim is not ripe for review.

A foundational principle of our justice system is that courts should hear cases involving actual cases or controversies and not insert themselves into issues that are abstract, hypothetical, or remote. *Steinmetz v. State, DOC Star Academy*, 2008 S.D. 87, ¶ 17, 756 N.W.2d 392, 299. A repudiation of a contract occurs when a party

unequivocally indicates that it will not perform his obligations when performance is due.[8] *Union Pac. R.R. v. Certain Underwriters at Lloyd's London*, 2009 S.D. 70, ¶ 39, 771 N.W.2d 611, 621-22. For purposes of Detmers's claim for anticipatory repudiation, "[t]he evidence must be viewed most favorably to [Costner,] and reasonable doubts should be resolved against [Detmers]." *Millard v. City of Sioux Falls*, 1999 S.D. 18, ¶ 8, 589 N.W.2d at 218.

Detmers argues that a real estate listing posted by a third party constitutes an unequivocal statement that Costner will breach their May 5, 2000 contract. However, that real estate listing is not an unequivocal statement of anything as such listings are not definite and are nearly always subject to negotiation. Even if this Court determines that the listing qualifies as an unequivocal statement that when the land is sold the sculptures will be moved, it is in no way an unequivocal statement that Costner will breach the contract.

Even if this Court finds the most restrictive continuing obligations exist under paragraph three of the parties' contract, Costner could still meet his obligation thereunder by placing the sculptures at a site at which he and Detmers agree. A subsequent placement of Costner's sculptures, if any, is still unknown. The real estate listing Detmers relies upon does not indicate where the sculptures may be placed. Accordingly, Costner has made absolutely no unequivocal statement that indicates that the sculptures will be moved to a location with which Detmers would not agree. Without such an

[8] As mentioned herein, Costner maintains that he has fully performed his obligations under paragraph three of the contract and that no duty remains thereunder.

unequivocal indication, Detmers's claim for anticipatory repudiation fails on ripeness grounds

V. The circuit court issued a declaratory judgment that Detmers has no continuing rights under the May 5, 2000 contract as it relates to the subsequent placement of the sculptures.

"Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." SDCL 21-24-1. "A matter is sufficiently ripe [for a declaratory judgment] if the facts indicate imminent conflict." *Boever v. South Dakota Bd. Of Accountancy*, 526 N.W.2d 747, 750 (S.D. 1995).

After conducting a review of the contract language, the circuit court property found that Detmers has no continuing rights in the placement or display of the sculptures at issue. Costner fully performed his contractual obligation under paragraph three of the parties' May 5, 2000 contract and no duties thereunder remain outstanding. As Costner owes Detmers no continuing duty under paragraph three of that contract, the circuit court property granted declaratory judgment for Detmers in that she has no continuing rights relating to the placement of the sculptures.

CONCLUSION

The parties to this action have previously appeared before this Court presenting the same issues and requesting the same relief. This Court considered the parties' relative rights and obligations under their May 5, 2000 contract, and ruled in favor of Costner, affirming the trial court which had concluded that "Costner fully performed under the contract." Detmers now appears before this Court again, and again asks It to

write additional provisions into the terms of the same unambiguous contract in an effort to obtain more rights than those for which the parties had bargained.

Costner performed his obligation pursuant to paragraph three of the parties' May 5, 2000 contract, and accordingly he is discharged from any further obligation thereunder. The terms of the contract only call for the parties to agree to the placement of the sculptures within ten years of the contract, but it did not provide Detmers any interest or input in the subsequent placement of the sculptures. It remains that Costner is the sole owner of the sculptures.

Because Detmers's claims fail on both res judicata grounds and on the merits, this Court should affirm the circuit court's holding.

If however this Court finds that Detmers has some continuing interest in the placement of the sculptures, genuine issues of material fact exist as to the nature and extent of those interests, and this Court should remand for further proceedings in the circuit court.

Respectfully submitted this 21st day of November, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with SDCL § 15-26A-66(b). The font is Times New Roman size 12, which includes serifs. The brief is 30 pages long and the word count is 8,540, exclusive of the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service. The word processing software used to prepare this brief is Microsoft Word and the word count from that program was relied upon in determining the word count of this brief.

Dated this 21st day of November, 2022.

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CERTIFICATE OF SERVICE

I certify that on November 21, 2022, a true and correct copy of the **APPELLEE BRIEF** was served via email upon the following individuals:

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APPENDIX

1.	May 5, 2000 Contract	App. 1- 2
2.	Findings of Fact and Conclusions of Law	App. 3 - 12
3.	*Detmers v. Costner*, 2012 S.D. 35	App. 13 - 17

App. 1

Kevin Costner

May 5, 2000

Peggy Detmers
Detmers Studios
13488 Shelter Drive
Rapid City, South Dakota 57702

Dear Peggy,

1. In order to assist you during your transition period to other work, I will pay you $60,000 ($5,000 per month on the first day of each month over the next year) once the last sculpture has been delivered to the mold makers. I will even make $10,000 of this a non-taxable gift to you so that you will only have to pay taxes on $50,000. If we are able to sell the "Ridge Runners" (H&R1, BB1, CW2, and CF3) or the "Collision" (H&R3 and BB13) in the life scale to any party at or above standard bronze market pricing, the $60,000 will have not to be paid. The receipts from any such sale will be divided as outlined in clause 2.

2. Although I will be the sole owner of all rights in the sculptures, including the copyright, in the sculptures, you will always be attached through your royalty participation. Because I believe that the sculptures are a valuable asset, I feel strongly that it is important that you maintain your 20% of gross retail price royalty on future sales of fine art reproductions (5% of gross retail price royalty on mass market reproductions selling for under $200). However, should you desire to sell that interest to me at some point in the future, I would be happy to discuss that with you in good faith.

3. Although I do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere, I will give you 50% of the profits from the sale of the one and one-quarter life scale sculptures after I have recouped all my costs incurred in the creation of the sculptures and any such sale. The sale price will be at our above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders).

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Exhibit B

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App. 2

4. We will locate a suitable site for displaying the sculptures if The Dunbar is not under construction within three (3) years after the last sculpture has been delivered to the mold makers. In the meantime, until the sculptures are put on display, I will permit you to market and sell reproductions and you can retain eighty percent 80% of the gross retail sales price and pay 20% to me. Once the sculptures are put on public display in public view, agreed upon by both parties (but with the final decision to be made by me if we do not agree), the percentages will reverse, 80% of the gross retail sales price to me and 20% to you. The marketing must proceed as outlined below.

5. After the sculptures are completed and prior to the resort's completion, I will, upon your request, advance the costs necessary to produce, photograph and advertise up to two (2) maquette limited editions (not to exceed $7,500 in the aggregate), provided that such advances will be recoupable out of sales proceeds and the royalties paid as indicated above. A minimum of two Southwest Art full page, full color ads are to be purchased (not to exceed $5,220 in the aggregate) within this first year (2000), to market one of the editions, it being understood that the amounts paid for such ads will be recoupable out of the sales proceeds.

If the foregoing is acceptable, please sign two (2) copies of this letter to confirm our agreement and return them to me.

Very truly yours,

[signature]

Kevin Costner

AGREED

[signature]

Peggy Detmers

App. 3

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS
COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT

****

PEGGY DETMERS AND DETMERS STUDIOS, INC.,

Plaintiffs,

vs.

KEVIN COSTNER AND THE DUNBAR, INC.,

Defendants.

Civ. 09-60

FINDINGS OF FACT AND CONCLUSIONS OF LAW

****

A trial to the Court was held on February 22 and 23, 2011, at the courtroom of the Lawrence County Courthouse, Deadwood. Plaintiffs appeared personally and by counsel, Mr. A. Russell Janklow and Mr. Andrew R. Damgaard, Sioux Falls. Defendants appeared personally and by counsel, Mr. James S. Nelson and Mr. Kyle L. Wiese, Rapid City. The Court having heard the testimony of witnesses and having reviewed the briefs and exhibits, issues the following FINDINGS OF FACT AND CONCLUSIONS OF LAW.

FINDINGS OF FACT:

1. Any Finding of Fact may be deemed to be a Conclusion of Law and any Conclusion of Law may be deemed to be a Finding of Fact.

2. The Court's Memorandum Decision dated 6-28-11 is herein incorporated by this reference.

3. Beginning in the 1990s, Kevin Costner envisioned building a five-star hotel and resort on real property north of

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Deadwood. This resort was to be named after one of his movie characters and called The Dunbar.

4. Costner planned to include sculptures of bison at the entryway to the hotel.

5. Costner commissioned artist Peggy Detmers to build the bison sculptures. The final plans for the sculptures called for 14 bison and 3 Lakota warriors mounted on horseback. The sculptures are 25 percent larger than life scale.

6. The parties agreed that Detmers would be paid $250,000 and would receive royalty rights in fine art reproductions of the sculptures that were to be marketed and sold at the gift shop/gallery at The Dunbar hotel.

7. In the late-1990s and the early part of 2000, Detmers stopped working on the sculptures because The Dunbar had not been built. Detmers and Costner negotiated additional compensation to Detmers in exchange for completion of the sculptures and entered into an express written contract on May 5, 2000. The contract provided an additional payment of $60,000 for Detmers (increasing her total compensation for the sculptures to $310,000), royalty rights on reproductions, and display of the sculptures. This contract is at the center of the parties' current dispute, and paragraph 3 provides:

> Although I do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere, I will give you 50% of the profits from the sale of the

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> one and one-quarter life scale sculptures after I have recouped all my costs incurred in the creation of the sculptures and any such sale. The sale price will be at our [sic] above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders).

8. Because the resort had not been built in the early 2000s, the parties began looking for alternate locations to display the sculptures pursuant to a display requirement in paragraph 4 of the May 5, 2000 agreement. Detmers considered locations in Hill City, while Costner consider locations in and around Deadwood.

9. Ultimately, Costner realized that he could place the sculptures on a portion of the real property he owned and intended for The Dunbar.

10. Costner called Detmers on January 23 or 24, 2002 to let her know that he was considering placing the sculptures at a site on The Dunbar property. At that location, Costner knew he could dedicate a site for the sculptures and provide them with protection, something that several of the temporary locations he considered could not.

11. Detmers received a phone call from Costner on January 23 or 24, 2002.

12. On January 29, 2002, the project's architect, Patrick Wyss, sent a letter to Costner confirming the beginning of the

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design process on this project, which came to be known as Tatanka.

13. Wyss was instructed by Costner to keep Detmers informed and involved. Beginning in June 2002, Detmers was influential in the placement of the sculptures on the Tatanka property.

14. In March 2003, the "mock-up" of the sculpture placement began. Numerous photos were admitted into evidence depicting Detmers' involvement in the "mock-up" and final placement of the sculptures.

15. The Court finds that the use of the "mock-ups" was Detmers' idea. Essentially this entailed placing temporary plywood cut-outs of the sculptures where the final sculptures would ultimately be installed. Using these wood "mock-ups," the design could be easily changed and rearranged before the final sculptures had been delivered for placement. Through the use of the "mock-ups" the exact location of each piece could be pinpointed using GPS technology and staking for final placement of each sculpture.

16. Costner ceded many decisions to Detmers because, as the artist, she "had a place of authority" and "heavy influence" regarding sculpture placement.

17. Numerous media articles from 2002 and 2003 quote Detmers as being "excited" and "relieved" about the sculptures

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placement at Tatanka. Those same articles characterize Tatanka as a "stand-alone" entity, completely separate from The Dunbar.

18. Tatanka consists of a visitor's center with a gift shop and café, interactive museum, nature walkways, and the sculptures.

19. Costner spent approximately $6,000,000 building this attraction.

20. Tatanka was dedicated and had its public grand opening on June 21, 2003. Both Costner and Detmers spoke at the grand opening.

21. In December 2008, Detmers brought suit against Costner alleging breach of contract. In her prayer for relief she requested specific performance. She alleges that because The Dunbar was not built within ten years and the sculptures are not agreeably displayed elsewhere she is entitled to 50 percent of the proceeds from the sale of the sculptures.

CONCLUSIONS OF LAW:

1. The Court has jurisdiction over the subject matter and personal jurisdiction over the parties.

2. As this Court has previously ruled, the terms of this contract are clear and unambiguous. Memorandum Decision and Order at 5.(December 17, 2010) ("The contract language is not ambiguous."). Said Memorandum Decision is incorporated herein by this reference.

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3. When terms are unambiguous, courts construe contract terms using the plain and ordinary meaning of the words. *Kjerstad Realty, Inc. v. Bootjack Ranch, Inc.*, 2009 SD 93, ¶¶ 10-11, 774 NW2d 797, 800-01; *Prudential Kahler Realtors v. Schmitendorf*, 2003 SD 148, ¶¶ 10-11, 673 NW2d 663, 666 ("[T]his Court will apply the 'plain and ordinary meaning' of the disputed term." (other citations omitted)).

4. "Elsewhere," as used in the contract, clearly means at a site other than The Dunbar. This is in accord with the regular meaning of that term. *See* BLACK'S LAW DICTIONARY 468 (5th ed. 1979) (defining elsewhere as "in another place; in any other place"); WEBSTER'S NEW COLLEGIATE DICTIONARY 404 (9th ed. 1986) (defining elsewhere as "in or to another place").

5. Because The Dunbar has not been built, any site is elsewhere, i.e., somewhere other than The Dunbar. The placement of the sculptures at Tatanka is elsewhere. It is "in another place[,]" separate and distinct, from the non-existent Dunbar hotel and resort.

6. In determining whether Costner and Detmers agreed to the sculptures' placement at Tantanka, the conduct of the parties is controlling. *See Weller v. Spring Creek Resort*, 477 NW2d 839, 841 (SD 1991) (recognizing that the existence of an implied contract is determined by the parties conduct); *see also Huffman v. Shevlin*, 72 NW2d 852, 855 (SD 1955) (considering "all

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the circumstances surrounding the execution of the writing and the subsequent acts of the parties" when determining the parties' intent).

7. Because the issue in this case, whether the sculptures were agreeably displayed elsewhere, requires the Court to determine if the parties made an agreement beyond that which is necessary to create the May 5, 2000 contract, the law of implied contracts is applicable. The Court must determine whether the parties' words, actions, and non-actions constituted a further agreement, i.e. an implied contract, regarding the placement of the sculptures somewhere other than The Dunbar. *See In re Estate of Regennitter*, 1999 SD 26, ¶ 12, 589 NW2d 920, 924 ("We look to the totality of the parties' conduct to learn whether an implied contract can be found." (other citations omitted)); *Weller*, 477 NW2d at 841.

8. The language of the contract contemplates that The Dunbar may not be built. The contract states, "[a]lthough I do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years . . . ." Therefore, the contract acknowledges the fact that The Dunbar may not be built.

9. Testimony from Costner and others associated with The Dunbar and Tatanka projects indicates that although Costner has been attempting to build The Dunbar for years, and continues to

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try to build it, he never promised Detmers or anyone else that it would actually be built.

10. Any reliance by Detmers on a promise or guarantee, from Costner or his associates, that The Dunbar would be built is unreasonable. *See Vander Heide v. Boke Ranch, Inc.*, 2007 SD 69, ¶ 30, 736 NW2d 824, 834 (finding that "alleged reliance was not in any way justified" (citing Werner v. Norwest Bank South Dakota N.A., 499 NW2d 138, 141-42 (SD 1993))); *Garrett v. BankWest, Inc.*, 459 NW2d 833, 848 (SD 1990) (rejecting a promissory estoppel claim because the alleged reliance was unreasonable).

11. Detmers actions following the decision to place the sculptures at Tatanka indicate that she agreed to display them at that location. Detmers was notified of the plan to place the sculptures at Tatanka in January 2002, she was involved as part of the construction team, she had significant involvement in the "mock-up" and placement of the sculptures in early 2003, and she gave a speech at the Tatanka grand opening in June 2003. Detmers documented her involvement in this project by use of her own photographer during the construction of Tatanka.

12. Detmers testified that she never told Costner that she disagreed with the placement of the sculptures at Tatanka:

> Q: . . . I asked you, did you ever personally tell Kevin that you did not want the sculptures at Tatanka?
> A: As I never thought it would be a stand-alone thing, so I never --

> Q: You didn't tell him, did you.
> A: I told him - I kept asking him, "Is the Dunbar going to be here?" and he said, "Yes." I go, "Okay."

Tr. Trans. Vol. 1, 95:7-13 (February 22, 2011). Detmers did not directly answer the question posed by Costner's counsel regarding whether she told him that she didn't want the sculptures at Tatanka, but based on the Court's observation of the witness during cross-examination, the Court finds that she did not make any definitive statement to Costner stating that she did not want the sculptures placed at Tatanka. Furthermore, Costner testified as follows on the same issue:

> Q: So at any time then did Peggy ever just tell you flat out, "I object to [Tatanka]. I don't want to do it. I don't agree"?
> A: No.

Tr. Trans. Vol. 2, 343:21-24 (February 23, 2011).

13. Her significant involvement in the Tatanka project and her failure to tell Costner or anyone else that she did not agree with placement at Tatanka indicate that she was agreeable to the sculptures' placement at Tatanka for the long term.

14. Costner's funding and building of Tatanka is further evidence of an agreeable display. It is unreasonable to think that Costner would expend millions of dollars in creating this attraction if the parties did not agree that this would be the final display area for the sculptures. To conclude that this was a unilateral decision by Costner that was not agreed upon by Detmers would cause an absurd result; namely that Costner would

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have spent $6,000,000 to place the sculptures at Tatanka and if The Dunbar was not built, the sculptures be moved someplace else that was agreeable to them both or that the sculptures be sold upon Detmars' demand. This Court cannot endorse such an absurd result. *See Nelson v. Schellpfeffer*, 2003 SD 7, ¶ 8, 656 NW2d 740, 743.

15. Costner has fully performed under the terms of the contract. The words, actions, and inactions of both parties indicate an agreement to the display of the sculptures at Tantanka.

16. Detmers has failed to prove that Coster breached the May 5, 2000 contract.

Therefore, it is hereby ORDERED:

That Detmers' prayer for relief is DENIED.

Counsel for Costner shall prepare a Judgment consistent with the Court's Findings of Fact and Conclusions of Law and Memorandum Decision within 14 days.

Dated this 28th day of June, 2011.

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BY THE COURT:

Hon. Randall L. Macy
Circuit Court Judge

ATTEST:

Clerk of Courts

Deputy

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814 N.W.2d 146
Supreme Court of South Dakota.

Peggy A. DETMERS and Detmers Studios, Inc., a South Dakota Corporation, Plaintiffs and Appellants,
v.
Kevin COSTNER and The Dunbar, Inc., a South Dakota Corporation, Defendants and Appellees.

No. 26104.
|
Argued March 19, 2012.
|
Decided May 9, 2012.

Synopsis
Background: Sculptor brought action against resort and its developer, seeking a declaratory judgment that she did not agree to placement of sculptures at developer's other project and thus that, under agreement, she was entitled to an order selling the sculptures and part of the proceeds from that sale. The Circuit Court, Fourth Judicial Circuit, Lawrence County, Randall L. Macy, J., entered judgment for developer, and sculptor appealed.

Holdings: The Supreme Court, Gilbertson, C.J., held that:

[1] architect's testimony that there was no understanding that resort where sculptures were to be placed "was ultimately going to be built" was admissible, and

[2] sculptures were "agreeably displayed elsewhere," as required under contract.

Affirmed.

EXHIBIT C

West Headnotes (8)

[1] Appeal and Error ⇐ Clear Error; "Clearly Erroneous" Standard

The Supreme Court will not set aside a trial court's findings of fact unless they are clearly erroneous.

2 Cases that cite this headnote

[2] Appeal and Error ⇐ De novo review

The Supreme Court reviews conclusions of law under a de novo standard, with no deference to the trial court's conclusions of law.

3 Cases that cite this headnote

[3] Declaratory Judgment ⇐ Admissibility

Landscape architect's testimony that there was no understanding that resort where sculptures were to be placed "was ultimately going to be built" was admissible, in sculptor's declaratory judgment action, to establish that developer had never promised sculptor that resort would actually be built, despite deposition testimony where architect had stated that it was his "understanding" that resort was "going to be built" at the time sculptures were placed at developer's other project; deposition testimony concerned whether the plan was still to build the resort at the time the sculptures were finished and placed at developer's other project, and that developer was still working towards building the resort and that placement of sculptures at other project was important to get committed investors.

[4] Specific Performance ⇐ Contracts for construction of buildings or other works

Sculptures originally created for unfinished resort were "agreeably displayed elsewhere," as required under contract, when they were displayed at developer's other project on land originally intended for the resort, such that sculptor was not entitled to specific performance of contract provision requiring the sale of the sculptures and split of proceeds in the event the resort was never built; term "elsewhere" indicated a location other than the resort, which was never built, and other project was

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constructed and managed as a separate legal entity from the resort proposal.

[5] Contracts ⇐ Ambiguity in general

Whether the language of a contract is ambiguous is a question of law.

4 Cases that cite this headnote

[6] Appeal and Error ⇐ Construction, interpretation, and application in general

Contract interpretation is a question of law reviewed de novo.

5 Cases that cite this headnote

[7] Contracts ⇐ Language of contract

When interpreting a contract, the Court looks to the language that the parties used in the contract to determine their intention.

6 Cases that cite this headnote

[8] Contracts ⇐ Language of contract

When the words of a contract are clear and explicit and lead to no absurd consequences, the search for the parties' common intent is at an end.

1 Cases that cite this headnote

Attorneys and Law Firms

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Kyle L. Wiese, James S. Nelson of Gunderson, Palmer, Nelson & Ashmore, LLP, Rapid City, South Dakota, Attorneys for defendants and appellees.

Opinion

GILBERTSON, Chief Justice.

[¶ 1.] In 2008, Peggy Detmers and Detmers Studios, Inc. (collectively "Detmers") brought suit against Kevin Costner and The Dunbar, Inc. (collectively "Costner"). The suit sought declaratory judgment regarding an agreement on the placement of sculptures Costner had commissioned from Detmers. After a bench trial, the court granted judgment in favor of Costner. Detmers appeals. We affirm.

FACTS

[¶ 2.] In the early 1990s, Costner envisioned building a luxury resort called "The Dunbar" on property he owned near Deadwood, South Dakota. After discussions, Costner commissioned Detmers to design 17 buffalo and Lakota warrior sculptures, intending to display them at The Dunbar's entrance. The bronze sculptures are 25% larger than life-size and depict three Lakota warriors on horseback pursuing 14 buffalo at a "buffalo jump." Detmers and Costner orally agreed that she would be paid $250,000 and would receive royalty rights in the sculptures' reproductions, which were to be marketed and sold at The Dunbar's gift shop. When The Dunbar had not been built in the late 1990s, Detmers stopped working on the sculptures.

[¶ 3.] After several months of negotiations, on May 5, 2000, Costner sent Detmers a letter detailing an agreement that would provide her additional compensation in exchange for completing the sculptures. *148 Detmers agreed and signed the letter as requested, creating a binding contract. As part of the agreement, Costner paid Detmers an additional $60,000, clarified royalty rights on reproductions, and provided her certain rights regarding display of the sculptures. Paragraph three of the agreement, which is at issue in this case, provides:

> Although I do not anticipate this will ever arise, if The Dunbar is not built within ten (10) years or the sculptures are not agreeably displayed elsewhere, I will give you 50% of the profits from the sale of the one and one-quarter life scale sculptures after I have recouped all my costs incurred in the creation of the sculptures and any such sale. The sale price will be at our above standard bronze market pricing. All accounting will be provided. In addition, I will assign back to you the copyright of the sculptures so sold (14 bison, 3 Lakota horse and riders).

[¶ 4.] Paragraph four of the agreement provides: "We will locate a suitable site for displaying the sculptures if The Dunbar is not under construction within three (3) years after the last sculpture has been delivered to the mold makers." Because the resort was not under construction within three

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years after the last sculpture had been delivered, Detmers and Costner began looking for display locations as required by paragraph four. Detmers suggested locations in Hill City, while Costner considered locations near Deadwood.

[¶ 5.] On January 23 or 24, 2002, Costner called Detmers and they discussed permanently placing the sculptures at a site on Costner's property where he intended to build The Dunbar.[1] The project became known as "Tatanka." Costner hired landscape architect Patrick Wyss to design Tatanka. Costner instructed Wyss to keep Detmers informed and involved in the design process. Detmers was influential in the sculptures' placement at Tatanka, including suggesting and implementing wood "mock-ups" to predetermine the exact location of each sculpture. Detmers, Costner, and Wyss were all present when the sculptures were placed at Tatanka. Tatanka was funded solely by Costner and is a separate legal entity from The Dunbar. In addition to the sculptures, Tatanka consists of a visitor center, gift shop, café, interactive museum, and nature walkways. Both Detmers and Costner spoke at Tatanka's grand opening in June 2003, expressing enthusiasm and pride in the attraction.

[¶ 6.] In 2008, Detmers brought suit against Costner, seeking a declaratory judgment that she did not agree to the placement of the sculptures as required by paragraph three of their May 2000 contract. For relief, Detmers sought an order requiring Costner to sell the sculptures with the proceeds dispersed consistent with paragraph three. Detmers claimed that because The Dunbar had not been built within ten years and the sculptures were not "agreeably displayed elsewhere," she was entitled to 50% of the proceeds from the sale of the sculptures.

[¶ 7.] Before trial, Costner moved to use parol evidence. Detmers objected, requesting a ruling that the May 2000 contract was unambiguous and parol evidence was therefore inadmissible. The circuit court concluded that the May 2000 contract *149 was unambiguous and denied Costner's motion to admit parol evidence. The sole issue at the bench trial was whether the sculptures were "agreeably displayed elsewhere." Costner, Detmers, and Wyss testified at trial.

[¶ 8.] After post-trial briefing, the court granted judgment in favor of Costner. The court maintained its earlier conclusion that the May 2000 contract was unambiguous. The court concluded that " '[e]lsewhere,' as used in the contract, clearly means at a site other than The Dunbar." Additionally, "[b]ecause The Dunbar has not been built, any site is elsewhere, i.e., somewhere other than The Dunbar. The placement of the sculptures at Tatanka is elsewhere." The court also concluded: "Detmers actions following the decision to place the sculptures at Tatanka indicate that she agreed to display them at that location...." Detmers appeals.

STANDARD OF REVIEW

[1] [2] [¶ 9.] "We will not set aside a trial court's findings of fact unless they are clearly erroneous." *Alto Twp. v. Mendenhall,* 2011 S.D. 54, ¶ 9, 803 N.W.2d 839, 842. "[W]e review conclusions of law under a *de novo* standard, with no deference to the trial court's conclusions of law." *Id.*

ANALYSIS

[¶ 10.] We restate and consolidate Detmers' issues on appeal to whether the circuit court erred in determining that the sculptures were "agreeably displayed elsewhere," as required under the contract. Under paragraph three, Detmers would only be entitled to specific performance if The Dunbar was not built or the sculptures were not "agreeably displayed elsewhere." The issue at trial was whether Detmers agreed to displaying the sculptures at Tatanka, which is a factual inquiry. The circuit court concluded Detmers agreed, as demonstrated by her conduct and actions, to permanent display of the sculptures at Tatanka.

[¶ 11.] On appeal, Detmers does not dispute that she agreed to display the sculptures at Tatanka. Instead, she asserts that she only agreed to the location because she had been promised or guaranteed that The Dunbar would still be built. Detmers cannot point to anything in the record supporting this assertion other than her own testimony. The circuit court found that Detmers was never promised or guaranteed that the Dunbar would be built. Costner maintained throughout this suit that he continues to attempt to build The Dunbar, but cannot promise it will happen. Detmers has not shown any findings to be clearly erroneous.

[¶ 12.] Furthermore, this action centers around a clause in the contract addressing what would happen *if the resort was not built.* The contract itself contemplates the possibility that The Dunbar might not be built. Detmers cannot assert that she was not aware that The Dunbar's future was questionable. Detmers has not demonstrated that the circuit court's finding was clearly erroneous. As to Detmers' argument that the finding

was unnecessary, the court appeared to address it because it was an issue raised by Detmers through questioning.

[3] [¶ 13.] Detmers asserts that to the extent the court used the testimony of Patrick Wyss to find that Detmers had not been guaranteed The Dunbar would be built, the court erred. The court found: "Testimony from Costner and *others associated with The Dunbar and Tatanka projects* indicates that although Costner has been attempting to build The Dunbar for years, and continues to try to build it, he has never promised Detmers or anyone else that it would actually be built." (Emphasis added.) Presumably, Wyss is an *150 "other[] associated with" the projects as he was the only other person to testify besides Costner and Detmers.

[¶ 14.] Wyss was prepared for trial by Costner's counsel. He testified as a fact witness, called adversely as part of Detmers' case-in-chief. Wyss was sequestered, so he had not heard Costner's testimony, given after being called adversely, or Detmers' testimony. Detmers' counsel asked whether, during the time the sculptures were being placed at Tatanka, "there was not only an understanding by [Wyss] but an understanding by Peggy Detmers that the Dunbar resort was ultimately going to be built." Wyss responded "No." Detmers' counsel then attempted to impeach Wyss with his deposition testimony where he was asked: "So the placement of the monument back in 2002, there was always an understanding, and it was being told to Peggy, that the Dunbar was still going to be built at that time; right?" Wyss responded, "That was my understanding."

[¶ 15.] Detmers made a motion after trial to strike Wyss' changed trial testimony. The court denied the motion. Detmers argues that the court should not have relied on Wyss' testimony. A review of Wyss' testimony reveals the context of Wyss' statements and his questioning. During Wyss' deposition, counsel was questioning Wyss on whether "the plan was still to build The Dunbar" when the sculptures were being placed. The context of the questioning shows that Costner and his team were still working towards building The Dunbar, and the placement of Tatanka was important to ensure The Dunbar could go forward if investors committed. Wyss explained at trial that "[t]he context of that conversation was the planned hotel...." He continued to emphasize that "there were efforts in place to attempt to get the hotel built."

[¶ 16.] Wyss' responses to Detmers' "impeachment" questions provide the necessary framework for understanding his answers. The circuit court was able to witness Wyss and the questioning at trial to determine credibility and the weight that should be afforded his testimony. We will not second-guess that determination. Even if the court did err in relying on Wyss' testimony, Detmers has not shown that the finding was clearly erroneous in light of the entire record indicating that Detmers had no reason to assume The Dunbar would be built.

[4] [5] [¶ 17.] Detmers also argues that the circuit court erred as a matter of law in its construction of the term "elsewhere." She asserts that "elsewhere" must be somewhere other than the proposed site for The Dunbar. She suggests that the circuit court's conclusion rewrites the contract. Additionally, she argues that if "elsewhere" is ambiguous, it should be construed against Costner. However, Detmers asserted before trial, and the court agreed, that the contract was unambiguous. That decision was not appealed.[2]

[¶ 18.] The circuit court concluded as a matter of law that the regular meaning of the term "elsewhere" applied. The court noted that Black's Law Dictionary defines elsewhere as "in another place, in any other place," and Webster's Dictionary defined it as "in or to another place." *See Black's Law Dictionary* 560 (8th ed. 2004). Accordingly, there must first be a designated place to determine if somewhere is *151 "another place." Paragraph three provides: "*if The Dunbar is not built* within ten (10) years *or* the sculptures are not agreeably displayed elsewhere." (Emphasis added.) The designated place is The Dunbar. The circuit court concluded that "elsewhere" meant at a place other than The Dunbar. And because The Dunbar had not been built, Tatanka was elsewhere.

[¶ 19.] Costner points out that the circuit court and Detmers both assign "elsewhere" its ordinary meaning, i.e., "in another place." The analysis diverges on whether "in another place" means another place from The Dunbar itself or from The Dunbar's intended site. Costner asserts that the circuit court was correct in concluding that "elsewhere" is in a place other than The Dunbar resort itself, which, according to the language, must be *built*. The land could not be built, but the resort could. Furthermore, the terms of the contract plainly do not say The Dunbar *site*.

[6] [7] [8] [¶ 20.] "Contract interpretation is a question of law" reviewed de novo. *Clarkson & Co. v. Cont'l Res., Inc.*, 2011 S.D. 72, ¶ 10, 806 N.W.2d 615, 618. "When interpreting a contract, 'this Court looks to the language that the parties used in the contract to determine their intention.' " *Id.* ¶

15, 806 N.W.2d at 619 (quoting *Pauley v. Simonson*, 2006 S.D. 73, ¶ 8, 720 N.W.2d 665, 667–68). "When the words of a contract are clear and explicit and lead to no absurd consequences, the search for the parties' common intent is at an end." *Nelson v. Schellpfeffer*, 2003 S.D. 7, ¶ 8, 656 N.W.2d 740, 743.

[¶ 21.] The plain words of the contract unequivocally provide that if The Dunbar was not built or the sculptures were not agreeably displayed elsewhere, then Detmers would be entitled to the relief described in paragraph three. "Elsewhere" must be understood in relation to the named place in the contract—The Dunbar. Costner is correct that to accept Detmers argument would rewrite the contract to include The Dunbar's intended location as well as the resort itself. This we will not do. *See Culhane v. W. Nat'l Mut. Ins. Co.*, 2005 S.D. 97, ¶ 27, 704 N.W.2d 287, 297 ("[W]e may neither rewrite the parties' contract nor add to its language...."). As a matter of law, the court did not err in its conclusion that Tatanka was elsewhere from The Dunbar. This conclusion is supported by giving the terms in the parties' contract their plain and ordinary meaning.

[¶ 22.] Detmers also alleges that the court was clearly erroneous in finding that Tatanka was intended to be separate and distinct from The Dunbar. She points to newspaper articles and testimony in the record indicating that if The Dunbar is built, Tatanka would be part of the resort property.

[¶ 23.] The record and numerous exhibits support the circuit court's finding that Tatanka is separate from The Dunbar. Testimony reinforced that Tatanka was constructed and managed as a separate legal entity from The Dunbar proposal. In her response to Costner's proposed findings of fact, Detmers concedes that Tatanka is a stand-alone site. Detmers has not demonstrated that the court was clearly erroneous or made an error of law in determining that Tatanka was separate from The Dunbar.

CONCLUSION

[¶ 24.] The circuit court did not err or make any clearly erroneous factual findings in determining that the sculptures are "agreeably displayed elsewhere," in the absence of a guarantee from Costner that The Dunbar would be built. Furthermore, the circuit court did not err in concluding that Tatanka was "elsewhere" under the language of the contract. We affirm.

*152 [¶ 25.] KONENKAMP, ZINTER, SEVERSON, and WILBUR, Justices, concur.

All Citations

814 N.W.2d 146, 2012 S.D. 35

Footnotes

1. During her deposition, Detmers initially denied that she received this phone call. After being confronted with telephone records, Detmers agreed Costner had called her. She then denied that Costner had suggested placement of the statutes at his Deadwood property during this call. During later questioning, she admitted that during the call he talked about The Dunbar location for the statutes.
2. "Whether the language of a contract is ambiguous is ... a question of law." *Pankratz v. Hoff*, 2011 S.D. 69, ¶ 10 n. *, 806 N.W.2d 231, 235 n. *. Even if this Court were to decide that the contract was ambiguous, the language of the contract, in addition to the findings of the circuit court, support judgment for Costner.

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THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 30117

PEGGY A. DETMERS,

Plaintiff/Appellant,

v.

KEVIN COSTNER

Defendant/Appellee.

Appeal from the Circuit Court
Fourth Judicial Circuit
Lawrence County, South Dakota

THE HONORABLE ERIC STRAWN
Circuit Court Judge

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Notice of Appeal filed on September 9, 2022.

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Argument

A trial court's grant of summary judgment may be affirmed even if the trial court granted it for the wrong reason. *Saathoff v. Kuhlman*, 2009 S.D. 17, ¶ 19, 763 N.W.2d 800, 806. That well-established rule is undoubtedly why the trial court's decision and Costner's brief engage in a shotgun approach, submitting numerous arguments, alternative arguments, and alternatives to alternatives in an effort to receive an affirmance. In addition to his numerous legal arguments, Costner now suggests that there may be factual issues necessitating a remand. (Appellee's Br., p. 26).

In her opening brief, Detmers addressed every argument and alternative argument that formed any basis for the trial court's decision. This reply brief will therefore focus on the more salient of the trial court's rationales. In short, there are no factual issues in this case, and although Costner has many arguments and alternatives thereto, none of them hit the proverbial mark.

I. Detmers's claims are not barred by res judicata.

A. Detmers's claims are not barred by issue preclusion.

The first of this Court's well-established four part test in analyzing the applicability of res judicata is whether the issue in the prior adjudication is identical to the issue in the current action. *Healy Ranch, Inc. v. Healy*, 2022 S.D. 43, ¶ 42, 978 N.W.2d 786, 799 (citing *Dakota, Minn. & E. R.R. Corp. v. Acuity*, 2006 S.D. 72, ¶ 17, 720 N.W.2d 655, 661 (additional citations omitted)). Issue preclusion bars "a point that was actually and directly in issue in a former action and was judicially passed upon and determined by a domestic court of competent jurisdiction." *Am. Family Ins. Grp. v. Robnik*, 2010 S.D. 69, ¶ 18, 787 N.W.2d 768, 775.

The issue in the prior case was whether the sculptures were "agreeably displayed elsewhere" (i.e., Tatanka). *Detmers v. Costner*, 2012 S.D. 35, ¶ 10, 814 N.W.2d 146, 149. The trial court found that Detmers and Costner agreed to the permanent display of the sculptures at Tatanka, even in the ultimate absence of the Dunbar Resort, which was intended to be built on the same property. (App. at 129; SR at 20). This Court affirmed the trial court's finding on appeal. *Detmers*, 2012 S.D. 35, ¶ 24, 814 N.W.2d at 151.

Costner acknowledges that whether the sculptures were agreeably displayed elsewhere (i.e., Tatanka) was the issue that was litigated in the prior proceeding. (Appellee's Br., p. 11). However, Costner repeatedly refers to that issue as "the principal issue," so as to imply that there were some underlying, less conspicuous issues that somehow foreclose Detmers's current claims. Costner fails to set forth these alleged collateral issues with any specificity, however, referring in broad generalities to "respective rights," "interests," and "obligations." (*Id.*).

The court in the previous action, however, was only tasked with determining the existence of an agreement between Detmers and Costner to display the sculptures somewhere other than the Dunbar Resort. *Detmers*, 2012 S.D. 35, ¶ 10, 814 N.W.2d at 149. The court found the existence of such an agreement and that the nature of the agreement was the permanent display of the sculptures at Tatanka. *Id.* In that respect, Costner had, at that time, performed under paragraph 3 of the express contract by securing Detmers's implied agreement to permanently display the sculptures at Tatanka.

The current case does not seek to re-litigate the existence of an implied contract between the parties to permanently display the sculptures *at Tatanka*, but seeks a determination of whether Costner has repudiated that agreement by stating his intention

to relocate the sculptures *from Tatanka*. Thus, the issue in the current case is not identical, or even similar to, the issue in the previous case. While all contract cases implicate parties' "respective rights," "interests," and "obligations," whether Costner could unilaterally relocate the sculptures was not remotely "a point that was *actually* and *directly* in issue in [the] former action and judicially passed upon and determined . . . ." *Robnik*, 2010 S.D. 69, ¶ 18, 787 N.W.2d at 775 (emphasis added). The trial court's holding to the contrary was error.

B. Detmers's claims are not barred by claim preclusion.

"For purposes of claim preclusion, a cause of action is comprised of the facts which give rise to, or establish, the right a party seeks to enforce. The test is a query into whether the wrong sought to be redressed is the same in both actions." *Healy Ranch, Inc.*, 2022 S.D. 43, ¶ 45, 978 N.W.2d at 799 (quoting *Glover v. Krambeck*, 2007 S.D. 11, ¶ 18, 727 N.W.2d 801, 805). "If the claims arose out of a single act or dispute and one claim has been brought to a final judgment, then all other claims arising out of that same act or dispute are barred." *Id.* (quoting *Farmer v. S.D. Dep't of Revenue & Regal*, 2010 S.D. 35, ¶ 9, 781 N.W.2d 655, 659). As a result, claim preclusion exists when a party knew or should have known of the existence of facts in the prior action and failed to raise any claims based upon those facts. *Id.* ¶ 59, 978 N.W.2d at 802; *Dakota, Minn. & E.R.R. Corp.*, 2006 S.D. 72, ¶ 20, 720 N.W.2d at 662.

The previous action was final after this Court's opinion was handed down in 2012. *Detmers*, 2012 S.D. 35, 814 N.W.2d 146. The facts giving rise to the current action occurred when Costner stated his intent to relocate the sculptures in a real estate listing that was published in the fall of 2021. (App. at 056, 082; SR at 6, 35). The facts

giving rise to this action could not have supported any claims or potential claims in the previous action because those facts had yet to occur and, as a result, it was not possible for Detmers to have known of those facts. Accordingly, the claim preclusion component of res judicata does not bar Detmers's current action.

C. It is Costner, not Detmers, who seeks to avoid or amend the findings in the previous action.

It is apparent from Costner's arguments that he believes the issues in the prior action and the findings that followed are of little significance. Instead, Costner's position, regardless of whether it takes the form of res judicata, discharge, duty, breach, or repudiation, are all premised on the theory that because he prevailed in the prior action, he cannot be subject to the current action. Specifically, because the trial court in the prior action held that Costner had fulfilled his contractual obligations as of 2011, he cannot have breached those obligations a decade later, regardless of whether the issues are different and based upon new factual developments.

In support of his argument, Costner points out throughout his brief that Detmers successfully argued in the prior action that the May 5, 2000 contract was unambiguous. (Appellee's Br., pp. 11, 15); *see also Detmers*, 2012 S.D. 35, ¶ 17, 814 N.W.2d at 150. Costner also cites this Court's decisional law for the proposition that the analysis of unambiguous contracts should be confined to the four corners of the contract. (Appellee's Br., pp. 21–22). Costner then points out that the May 5, 2000 contract does not include the term "permanent" and that Detmers's Reply Brief in the 2012 appeal stated that the May 5, 2000 contract "calls for an agreement with respect to location, not duration." (*Id.* at n.3).

Costner is correct that Detmers did not take the position in the previous action, or this action, that the May 5, 2000 contract was or is ambiguous. In fact, it was Detmers's position in the prior action that the plain meaning of "elsewhere" (i.e., somewhere other than the resort) was dispositive of the prior case, as Detmers agreed to display the sculptures on the *same property intended for the resort, eight years before* the resort was contractually required to be built, and at a time when Costner and every individual acting upon his behalf intended that Tatanka *would be part of the overall resort*. *See Detmers*, 2012 S.D. 35, ¶ 22, 814 N.W.2d at 151 ("[Detmers] points to newspaper articles and testimony in the record indicating that if The Dunbar is built, Tatanka would be part of the resort property."). In fact, Detmers had obtained deposition testimony from Costner's architect that when the sculptures were displayed at Tatanka in 2002, "there was always an understanding, and it was being told to [Detmers], that the Dunbar was still going to be built at that time . . . ." *Id.* ¶ 14, 814 N.W.2d at 150.

On the other hand, Costner's position was that he and Detmers agreed to permanently display the sculptures at Tatanka regardless of whether the resort was ever built. In support of his position, Costner testified about a phone call he and Detmers had where they discussed "permanently placing the sculptures" at Tatanka. *Id.* ¶ 5, 814 N.W.2d at 148. Although Costner acknowledged he told Detmers that he intended to build the resort on the same property where the sculptures were being displayed, he never "promised or guaranteed that the Dunbar would be built." *Id.* ¶ 11, 814 N.W.2d at 149. Finally, the trial court in the previous action allowed the architect to testify contrary to his deposition and denied Detmers's Motion to Strike the changed testimony. *Id.* ¶¶ 15–16, 814 N.W.2d at 150.

So while Detmers maintained that "elsewhere" had nothing to do with duration, but required an agreement to display the sculptures in the ultimate absence of the resort, her argument did not carry the day. The trial court specifically found that Detmers and Costner formed an implied contract that Tatanka would be the permanent/"final display area" for the sculptures, regardless of if the resort were ever built. (App. at 129; SR at 20). Although Detmers subsequently appealed to this Court, the deference given to factual issues, such as the existence of an implied contract, was and is such that the trial court's decision effectively ended the case.

Over a decade later and at a time when Costner seeks to unilaterally relocate the sculptures from Tatanka, the finding of an implied contract has become extremely inconvenient for Costner. His desire to avoid or amend that finding explains every argument, no matter how numerous or convoluted, he has made in the current case. It also explains why Costner has quoted Detmers's Reply Brief from the prior appeal in the fact section of his current brief and labeled the quote as "correct." (Appellee's Br., p. 7).

The fact that the May 5, 2000 contract is unambiguous does not justify ignoring or amending the trial court's findings concerning the implied contract in the prior action. It is well-established that the parol evidence rule only bars "extrinsic evidence of prior negotiations offered to contradict or supplement a written contract." *Hofeldt v. Mehling*, 2003 S.D. 25, ¶ 11, 658 N.W.2d 783, 787. "By its express statutory language, the rule does not apply to conduct and statements taking place *after* a contract has been

executed." *Id.* (emphasis in original). "Indeed, contractual rights and remedies may be modified or waived by subsequent conduct." *Id.*[1]

So while Costner hangs his hat on the fact that he prevailed under the May 5, 2000 contract in the previous action, he conveniently neglects to point out that the sole basis of the trial court's holding was the finding of a subsequent implied contract wherein Costner and Detmers agreed to permanently display the sculptures at Tatanka. (App. at 127; SR at 18) ("Because the issue in this case, whether the sculptures were agreeably displayed elsewhere, requires the Court to determine if the parties made an agreement beyond which is necessary to create the May 5, 2000 contract, the law of implied contracts is applicable"). Indeed, in order for the May 5, 2000 contract's "agreeably displayed" requirement to have been satisfied, the court in the previous action necessarily *had to make* a factual finding that a subsequent contract, whether express, oral, or implied, had been formed by Detmers and Costner.

While the existence of an implied contract carried the day for Costner in the previous action, the implied contract's terms (i.e., the permanent display of the sculptures at Tatanka) prevents his ability to unilaterally relocate the sculptures now. The recognition of a contract and its terms creates the obligation to abide by it or be in

[1] This principle is dispositive of Costner's claim that this Court cannot examine the finding concerning the subsequent implied contract and its terms and must instead confine its analysis to the May 5, 2000 contract. The principle that parol evidence does not bar evidence occurring subsequent to an express contract also negates the assertion that Detmers is somehow estopped from relying upon the finding that the implied agreement was to "permanently display" the sculptures at Tatanka because she argued the May 5, 2000 contract was unambiguous. (Appellee's Br., n.1).

breach.[2] The law does not afford any party, including Costner, the benefits of an outcome without accepting its burdens.

II. Costner is judicially estopped from arguing permanent means something other than permanent.

The gravamen of judicial estoppel is the "intentional assertion of an inconsistent position that perverts the judicial machinery." *Hayes v. Rosenbaum Signs and Outdoor Advert. Inc.*, 2014 S.D. 64, ¶ 14, 853 N.W.2d 878, 882. The following elements are considered in determining whether to apply judicial estoppel: "the later position must be clearly inconsistent with the earlier one; the earlier position was judicially accepted, creating the risk of inconsistent legal determinations; and the party taking the inconsistent position would derive an unfair advantage or impose an unfair detriment to the opponent if not estopped." *Id.* ¶ 15, 853 N.W.2d at 883.

Costner does not dispute that he submitted proposed findings in the prior case that the sculptures were to be at Tatanka "for all times." (App. at 136, 138; SR at 215, 217). Nor does he deny that his proposed findings referred to his and Detmers agreement to display the sculptures at Tatanka as "permanent" on four separate occasions. (App. at 133, 135, 137–38; SR at 212, 214, 216–217). Instead, Costner argues that his position on the terms of the implied contract was not adopted by the trial court in the prior action because it did not specifically use "for all times" in its findings and conclusions. (Appellee's Br., p. 20). Instead, the trial court referred to the sculptures being "the final

[2] Costner claims the trial court's finding of an implied contract to permanently display the sculptures at Tatanka does not create any additional rights or support a cause of action. (Appellee's Br., p. 24). Costner's assertion is inaccurate. *Johnson v. Kreiser's, Inc.*, 433 N.W.2d 225, 227 (S.D. 1988) (employee had claim for breach of implied contract); *Weller v. Spring Creek Resort, Inc.*, 477 N.W.2d 839, 841 (S.D. 1991) (complaint stated a cause of action for breach of an implied contract).

display area for the sculptures" and that they would remain there for "the long term." (App. at 129; SR at 120).

Costner overlooks that "final" and "for all times" are synonymous with "permanent." He also ignores the fact that the trial court used "permanent" to describe the implied contract between Detmers and Costner multiple times in the trial court's Memorandum Opinion and Order. Of course, it was not a coincidence that this Court also used "permanent" to describe the agreement to display the sculptures at Tatanka. *Detmers*, 2012 S.D. 35, ¶ 10, 814 N.W.2d at 149 ("The circuit court concluded Detmers agreed, as demonstrated by her conduct and actions, to permanent display of the sculptures at Tatanka."). Indeed, some of the evidence that supported this finding was Costner's testimony that he and Detmers discussed "permanently placing the sculptures at a site on Costner's property where he intended to build The Dunbar." *Id.* ¶ 5, 814 N.W.2d at 148.

In short, Costner's factual position with respect to an agreement to permanently display the sculptures at Tatanka was adopted by the trial court in the prior proceeding and affirmed by this Court on appeal. Any attempt to engage in semantic games or rely upon children's dictionary definitions is inconsistent with Costner's prior position, creates a risk of inconsistent legal determinations, and imposes an unfair detriment to Detmers.[3]

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[3] Detmers addressed the other arguments relied upon by Costner and the trial court in her opening brief, and those arguments will not be repeated here.

III. Conclusion.

Despite Costner's numerous arguments and attempts to confuse and deflect, as mentioned in Detmers's opening brief, the issue in this appeal, in its most basic form, is whether the finding that allowed Costner to prevail in the prior action applies with equal force and finality to him in this action. This Court's precedent related to res judicata, judicial estoppel, and anticipatory repudiation answer that inquiry in the affirmative.

Having tied Detmers's compensation to future royalty rights on fine art reproductions as opposed to commissioning the work for a sum certain, Costner assumed an obligation to display the originals at the Dunbar Resort or some other agreeable location in its absence. That location was found to be Tatanka and the agreement to display the sculptures at that location was found to be permanent. Whether those findings were correct or incorrect or convenient or inconvenient is of no legal significance—they are final as between the parties.

Every cloud, however, has a silver lining. If Costner did not want to perpetually pay Detmers royalty rights, he could have purchased her interest to those rights as set forth in the contract. (App. at 027; SR at 10) ("However, should you [Detmers] desire to sell that interest [royalties] to me [Costner] at some point in the future, I would be happy to discuss that with you in good faith"). Similarly, if Costner no longer desired to display the sculptures at Tatanka, he could have sought Detmers's agreement to display them at another location or he could have sold the sculptures, recouped his costs in creating them, taken 50% of the profits from the sale, transferred the copyright back to Detmers and relieved himself of any further obligations.

What Costner cannot do is have it both ways. He cannot use the judiciary to prevail in one action by convincing it of an agreement to permanently display the sculptures at Tatanka, and then subsequently convince the judiciary that same agreement was actually temporary in an effort to assist him in removing the sculptures as he permanently and finally departs from Deadwood having abandoned, for all times, his plans for The Dunbar Resort.

Respectfully submitted this 20th day of December, 2022.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this reply brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2013, Times New Roman (12 point) and contains 3,086 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 20th day of December, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December, 2022, I electronically filed and served Plaintiff/Appellant's Reply Brief through the Odyssey File and Serve system upon the following:

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